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COURT OF APPEALS
STATE OF NEW YORK

MATTER OF PEOPLE CARE INCORPORATED,

Respondent,

-against-

No. 13

CITY OF NEW YORK HUMAN RESOURCES
ADMINISTRATION, et al.

Appellants.

20 Eagle Street
Albany, New York
February 9, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: We'll next hear appeal
2 number 13 on the calendar. Good afternoon. This is appeal
3 number 13 on this afternoon's calendar, Matter of People
4 Care Incorporated v. City of New York Human Resources
5 Administration.

6 Counsel?

7 MR. LEE: Good afternoon, Your Honor. May it
8 please the court. May I reserve two minutes for rebuttal?

9 CHIEF JUDGE DIFIORE: Yes, you may.

10 MR. LEE: Thank you, Your Honor. This case comes
11 down to a basic proposition. Money given under a state-
12 approved contract granting HRA the authority to audit, is
13 subject to that auditing authority.

14 First, there is no dispute that we have authority
15 to audit under the contract. Second, there is also no
16 dispute that the company received the earmarked funds,
17 which were meant for its front-line workers, under the
18 contract. In January 2003, in accordance with the
19 contract's terms, HRA notified People Care, in writing,
20 that because of the legislature's appropriation of the
21 earmarked funds the company's contractual Medicaid payment
22 - - -

23 JUDGE RIVERA: If I may ask a question, Mr. Lee.
24 How do you avoid the statement in the statute, the Health
25 Care Reform Act, and in the MOU, that says DOH audits and



1 DOH shall recoup.

2 MR. LEE: I'll tackle that separately. First,
3 with respect to the statute, the statute is an affirmative
4 grant of authority; it is not an exclusive grant of
5 authority. People Care keeps wanting to read in the words
6 "exclusively" and "only". And that doesn't exist. In
7 fact, if you turn to the MOU, the recital, which People
8 Care agrees is nonbinding and unenforceable, says that DOH
9 may audit, which reflects that both parties to the MOU,
10 which is HRA and the State, believe that the statute was an
11 affirmative grant of authority.

12 And I think the real test isn't the plain
13 language; it's the legislative intent. And this court has
14 repeatedly made clear that legislative intent is the
15 driving force and the lodestar of statutory intent - - -

16 JUDGE RIVERA: Let's say we agree with that, that
17 it may, as opposed to it is the only one that indeed does
18 audit or has the authority to audit and recoup, then what
19 do you rely on for HRA's authority? Is that then because
20 the contract says so, and it's a pre-existing partnership
21 with DOH, and DOH has in the past delegated it, they didn't
22 need to redelegate this power?

23 MR. LEE: That's - - - that's correct, Your
24 Honor. I want to be clear about our position and what I
25 take the State's position to be, based on their amicus



1 brief. And that position is that the contract is a pre-
2 existing source of authority in which DOH - - - DOH granted
3 HRA the authority. And not only did it approve the
4 contract, it approved the mechanism by which the State - -
5 - by which HRA formulates those contracts.

6 And I want to be clear about why it's important
7 we focus on the contract. I think this is a background
8 point that I want to bring to the forefront. The contract
9 governs this dispute because the entire personal care
10 services program is run on contracts. This part of the
11 Medicaid program, there's no state institution where you
12 can get personal care services. In order to get personal
13 care services, eligible Medicaid recipients have to be
14 paired with a contracted provider; in this case that's
15 People Care. And this is plain from the personal care
16 service's regulations.

17 JUDGE RIVERA: It's a slightly different
18 question. Let me just clarify this - - -

19 MR. LEE: Sure.

20 JUDGE RIVERA: - - - because I think this is
21 where the majority was in the Appellate Division. So are
22 you saying there is no other way, other than by treating
23 this as money that is dis - - - reimbursed, disbursed,
24 pursuant to the contract, there is no other way that People
25 Care could have gotten this money but through the fact that



1 they had a contract with you? That is to say, the statute
2 on its own, once there's a certification doesn't mean that
3 you just give out the money. Is that what you're arguing?
4 I just want to understand, sort of, your point about that.

5 MR. LEE: Yes, that's absolutely correct because,
6 again, without a contract, the provider isn't entitled to
7 money. We're not just handing out these to any company, so
8 to speak, but you have to be a contracted provider. And if
9 there's any doubt about that, the record is very clear on
10 this. Page 157 of the record is a letter in which HRA
11 explains how the earmarked money, under the Health Care
12 Reform Act, is going to affect People Care. And it says
13 their contractual rate is 13.75 an hour. And that's
14 confirmed, if you look at the contract, on page 74. You'll
15 see in the contract, that was their existing rate, 13.75.
16 But because of the earmarked funds, the legislature's
17 appropriation, that rate goes from \$13.75 to \$15.10. And
18 the letter explains how it actually is going to be
19 disbursed under the contract.

20 And just to give you some background, all of
21 these contracts that HRA formulates, there's two
22 components, what's called direct labor, which is paying the
23 actual personal care service workers who deliver the care.
24 That could be feeding, that could be grooming, that's
25 cooking, getting prescriptions for the elderly individuals.



1 And then there's what's called indirect labor which is sort
2 of administrative costs to run the business.

3 JUDGE STEIN: Counsel?

4 MR. LEE: The nonprofit - - - go ahead.

5 JUDGE STEIN: Counsel, can I just ask you? I
6 just want to make sure I understand and see if I can
7 simplify the argument a little bit and make sure I'm not
8 misstating it. Are you saying that the funds received
9 pursuant to HCRA are Medicaid funds like any others; they
10 just come from a particular - - - a special revenue stream,
11 I think is the language that's used, but they're treated
12 exactly the same as all of the other Medicaid funds that
13 are funneled or disbursed to the providers for these
14 personal care services?

15 MR. LEE: That's correct.

16 JUDGE STEIN: Okay.

17 MR. LEE: Funnel is the perfect way to use it.
18 The contract is a funnel. There is an existing stream of
19 money, and the legislature says let's add - - - let's add
20 another stream of money going in through that funnel. And
21 the legislature was clear on that. It said specifically we
22 are supporting the State's share of this rate. Now, my
23 under - - -

24 JUDGE STEIN: Is this common - - - is this, you
25 know, commonly done or, I mean, is there something that



1 differentiates this from other special revenue streams?

2 MR. LEE: It's - - - there's nothing uncommon
3 about this. I think, as the State explained in its amicus
4 brief, Medicaid funding comes from a lot of different
5 sources. And if you look at this particular statute,
6 2807-v, Medicaid mentions - - -

7 JUDGE RIVERA: Mr. Lee, it is clear that this is
8 earmarked, though?

9 MR. LEE: Yes, that is the one thing - - -

10 JUDGE RIVERA: For particular services and for
11 labor. It's not - - - you can't use it for anything else.
12 It's not a general funding stream.

13 MR. LEE: That's correct. The one difference
14 actually cuts in our favor. It's that the legislature said
15 we're going to give you a contractual rate increase, and
16 that's because the State and the federal government split
17 fifty-fifty on this particular Medicaid stream. So they're
18 saying we're willing to pay a little bit more to make sure
19 the workers get paid more. And here's what - - -

20 JUDGE FAHEY: Mr. Lee - - -

21 MR. LEE: - - - they're earmarked - - - yes,
22 Judge?

23 JUDGE FAHEY: Mr. Lee, just to follow up on Judge
24 Rivera's question, the earmarking of the funds, the
25 legislature receives revenue from a variety of sources and



1 then it - - - and then it passes a budget and it marks
2 where those variety of revenue sources go. When this money
3 comes in, as you said, there were a variety of streams, and
4 Judge Rivera used that phrase too, a variety of streams
5 that go in here. Have these funds, as I understand it,
6 from the tobacco settlement, were all directly - - - and I
7 forget whether they all - - - these particular funds were
8 all directly targeted for Medicaid use programmatically; is
9 that correct?

10 MR. LEE: This particular stream, yes, it's
11 correct. It was targeted for this particular program. I
12 just want to explain two things about this. It's called
13 the tobacco litigation fund, but it's not just tobacco
14 litigation. It's also other taxes and - - - it's a very
15 long statute. If you read it, you'll see the different
16 sources that come in. The main source, I believe, at the
17 beginning, was tobacco litigation. But it since
18 encompasses a lot of different sources.

19 JUDGE FAHEY: Okay. The things that were going
20 to be audited, were they used for any other purposes than
21 Medicaid-related purposes?

22 MR. LEE: No, they were - - - the only intent - -
23 - this is why it's Medicaid money. It was given to a
24 Medicaid provider, People Care, to provide a Medicaid
25 benefit, personal care services, to qualified recipients.



1 And the only intention that the legislature said, and it
2 said in the statute, it was to make sure that these
3 providers could better retain the individual workers who
4 deliver the personal care services. Because I think, as
5 this court knows, these workers are very low paid - - -

6 JUDGE FAHEY: On a different point, Mr. Lee, in
7 reading the Appellate Division decision, it seemed to me
8 that I - - - it read like they felt that they were
9 constrained by their 2011 decision in this matter. Do you
10 agree with that?

11 MR. LEE: I think that is how the majority felt,
12 but I think the dissent - - -

13 JUDGE FAHEY: Tell me why you think that.

14 MR. LEE: Well, I think that because they have
15 language in the opinion that suggested that they had
16 necessarily decided the contractual issue. But I think, as
17 the dissent pointed out, that's just not correct. Nowhere
18 in that decision do they say that they decide that issue.
19 And in fact, they remanded this case to determine, the
20 dissent points out, whether or not HRA was in fact
21 authorized to do that. And after that remand, we submitted
22 evidence in this case - - - on the remand, we submitted an
23 affidavit from the State's CFO that runs Medicaid
24 explaining exactly how this works. And I think the
25 majority just got it wrong in believing that they were



1 constrained by that 2011 - - -

2 JUDGE FAHEY: Is there any other auditing
3 function that - - - where - - - let me phrase this again.
4 Does HRA have any other auditing function with Medicaid
5 funds that they are not allowed to do, as is being - - - as
6 the Appellate Division has done here, they aren't allowed
7 to audit a particular area. Is this the only area of
8 Medicaid funding where they're restricted in their
9 auditing, both recoupment and auditing abilities?

10 MR. LEE: I think that's yes, based upon what the
11 First Department has done. I mean, I think it has
12 disrupted the way that HRA and the State work together to
13 make sure that there is integrity in Medicaid spending.

14 JUDGE FAHEY: Well, I - - -

15 CHIEF JUDGE DIFIORE: Thank you.

16 JUDGE FAHEY: Thank you. Thank you.

17 CHIEF JUDGE DIFIORE: Counsel?

18 MR. FLEMING: Good afternoon, Your Honor. Thomas
19 Fleming for respondent, People Care.

20 If I could just, as an aside, note that, at any
21 time over the past fifteen years, the Department of Health
22 could have audited these funds. We haven't hid anything
23 from anybody. The DOH has a website devoted to HCRA using
24 all of its - - -

25 JUDGE STEIN: But counselor - - -



1 MR. FLEMING: - - - audit powers.

2 JUDGE STEIN: Counselor, in all fairness, does
3 DOH ever audit Medicaid funds that are distributed by HRA
4 pursuant to a contract for personal care services?

5 MR. FLEMING: Well, this was not distributed
6 pursuant to a contract for - - -

7 JUDGE STEIN: Well, that - - -

8 MR. FLEMING: - - - personal care services.

9 JUDGE STEIN: That's sort of the crux of the
10 case, isn't it?

11 MR. FLEMING: I agree, Your Honor. And let me
12 explain why I say that because it is the crux, Your Honor.
13 These are fundamentally not Medicaid funds. The HCRA
14 grants are - - - come from the tobacco control initiative
15 pool, and they are targeted for a specific purpose.
16 They're not aimed at going to the needy; they're aimed at
17 going to the people, the personal care attendants who serve
18 them, and they go to recruitment and retention. There were
19 specific amounts for specific years, targeting specific
20 individuals. Medicaid was simply - - - and the Medicaid
21 rate add-on in the system was simply the way to get the
22 money to the intended recipients who were the personal care
23 attendants.

24 JUDGE STEIN: Let me ask another question. Are
25 there - - - has People Care ever received any funds through



1 HRA for personal care services other than Medicaid funds?

2 MR. FLEMING: They have received Medicaid funds,
3 which is the standard - - - which we have under the
4 contract, where they receive a set rate based on the number
5 of employees they have and the work they're doing. They've
6 received these funds which are targeted at their employees
7 for recruitment and retention. And they've received
8 additional funds, also through the tobacco control
9 initiative, for what's called the home care worker
10 demonstration program which is also - - -

11 JUDGE RIVERA: Mr. Fleming, if I can just
12 interrupt you. I think it's apropos of Judge Stein's
13 question. If the contract says that here's the ARM, here's
14 the rate, this is the labor, the hourly rate that the
15 labor's going to be paid, and you've just now said that
16 there's Medicaid funds that goes to this contract, why
17 isn't this other source of funding for the cost of wages
18 also Medicaid funds? You are already spend - - - there is
19 already Medicaid funding going to the hourly rate; this is
20 just more money to get you a higher hourly rate. It's
21 still Medicaid funding.

22 MR. FLEMING: Your Honor, I think - - - I
23 respectfully think the court misapprehends what the statute
24 is here and misapprehends our contract. What the contract
25 provides is we get to keep what are termed allowable



1 payments, which is the hourly fee that we get, and that
2 covers our direct labor, overhead, and a profit. These
3 funds that we got are not part of the allowable payments.
4 They have a totally different track, and they don't go to
5 labor. They don't have to go to the individual employees
6 to pay them additional funds. They go to recruitment and
7 retention, which is a wide variety of things that we could
8 be doing with them that don't fit into any of these
9 categories. And in this case, as we allege in the
10 complaint - - -

11 JUDGE RIVERA: Yes, I understand, but as - - -
12 you will correct me if my understanding of the record is
13 wrong. As I understand what happened here is you put in
14 your certification, HRA approves it and tells you, okay,
15 this is how the additional money is going to be spent. It
16 now ups - - - it increases the hourly wage. Did you object
17 to that and say, no, I don't want to use it for that?

18 MR. FLEMING: No, the HRA did not tell us - - -
19 did not tell us how the money had to be spent. The statute
20 and the MOU tell us the money has to be spent for
21 recruitment and retention. It was not required to be spent
22 on an annual cycle, which is part of the problem here
23 because HRA audits the Medicaid funds on an annual cycle.
24 They're paid - - -

25 JUDGE RIVERA: It still sounds to me - - - if I



1 can interrupt you. It still sounds to me that what you're
2 disputing is whether or not you misused the funds, which is
3 not really the question.

4 MR. FLEMING: Well - - -

5 JUDGE RIVERA: Right? The question is whether or
6 not they have authority to audit and determine for
7 themselves whether or not you have misused the funds and
8 they want it reimbursed. You can say we didn't misuse the
9 funds. That's a different issue. But that's not the issue
10 before us.

11 MR. FLEMING: Well, the issue in the - - - when
12 they exercise their authority under the contract, Your
13 Honor, it's not a question of misuse. Their position is
14 that we didn't spend them. So if we spent them after the
15 contract - - -

16 JUDGE RIVERA: Yes, but either way, that's not
17 the question before us. The question before us is whether
18 or not they're authorized to take a look, and then based on
19 their determination, to demand reimbursement. Again, you
20 could say, well, you're wrong, I complied with the law, and
21 I don't have to give it back, but that's not the question
22 before us.

23 MR. FLEMING: Well, Your Honor, I respectfully
24 submit, the question before the court is when you look at
25 the contract, that these funds, and the whole recoupment



1 mechanism that's set up in the contract, has no
2 application. There's no way they can measure them under
3 the contract - - -

4 JUDGE STEIN: Well, counselor - - -

5 MR. FLEMING: - - - and what the First Department
6 - - -

7 JUDGE STEIN: Counselor, you agree that DOH would
8 have the authority to audit and recoup these funds,
9 correct?

10 MR. FLEMING: Absolutely, Your Honor.

11 JUDGE STEIN: Okay. So what is the difference -
12 - - what is the practical difference to you whether that
13 process, whatever the permissible process may be, in your
14 view, what difference does it make whether DOH does it or
15 HRA does it?

16 MR. FLEMING: It's a huge difference, Your Honor,
17 and it's a huge difference because the audit and recoupment
18 process that's under this contract goes off of an annual
19 cycle. So as a result of the annual cycle, we were caught
20 in a trap where we had actually spent the money. The audit
21 takes place years later, and we had spent the money after
22 the audit, and then they said, well, you didn't spend it
23 during the audit years so now we want it back. But it's
24 already been spent.

25 JUDGE STEIN: Okay. But if a court were to



1 determine - - - or whatever the process is in your
2 contractual - - - or whatever, the appropriate process is.
3 If it were to be determined that it was irrational or
4 improper or illegal or whatever to base it on an annual
5 allotment, right, it doesn't matter whether that whole
6 process is followed by HRA or whether it's followed by DOH,
7 that's what you are really contesting is whether that
8 method of recoupment is appropriate, right - - - or
9 auditing and recoupment.

10 MR. FLEMING: Well, that's certainly essential to
11 our objection, but the - - - that error, we believe,
12 reflects a larger gap in the HRA's authority because they
13 don't have - - - their sole mechanism is an angled one, and
14 the fact that they make this very obvious and serious
15 mistake, which by the way, the CDRB has, in another
16 parallel case, has ruled they can't do.

17 But the fact that they make that mistake reflects
18 the fact that they are treating these as general Medicaid
19 funds when they are not coming from state and federal
20 funding and the social services law. They're coming
21 through a special set-aside program with targeted purposes
22 to help our employees, and coming to us, with some
23 discretion over when we use them and with accountability we
24 believe only to the Department of Health. And that's
25 parallel to the other program we're in, which is the



1 Homecare Worker Demonstration Program where we also
2 received money. It was targeted for our employees and to
3 help with their insurance benefits. And - - -

4 JUDGE RIVERA: But if I may ask, there would - -
5 - if you're not - - - to Mr. Lee's point, if you don't have
6 a contract with HRA, there is no service for the government
7 to pay for; is that not correct?

8 MR. FLEMING: Well, we have to have a - - - the
9 way these were computed, because they were going to
10 employees or home care attendants with direct patient
11 services to help the needy, so you'd have to have a
12 contract to be reimbursed for those types of services.

13 JUDGE RIVERA: Right, but the "needy", in this
14 context, are Medicaid recipients, are they not?

15 MR. FLEMING: No, the beneficiaries are our
16 employees, the - - -

17 JUDGE RIVERA: No, no, no - - -

18 MR. FLEMING: - - - home care attendants.

19 JUDGE RIVERA: No, no, no, but the people who get
20 the service.

21 MR. FLEMING: Yes.

22 JUDGE RIVERA: The people who get the home
23 service - - -

24 MR. FLEMING: Absolutely.

25 JUDGE RIVERA: - - - they are all Medicaid



1 recipients, right?

2 MR. FLEMING: Correct. This program we have a
3 contract with the City, and we provide home care attendant
4 services to a certain number of individuals who are
5 Medicaid recipients in the four boroughs, yes.

6 JUDGE RIVERA: But for the Medicaid program,
7 there would be no basis for you to get any funds.

8 MR. FLEMING: Correct, Your Honor. This was - -
9 -

10 JUDGE RIVERA: Regardless of the source?

11 MR. FLEMING: Correct - - - I believe that's
12 correct, Your Honor. And this was a program that was set
13 up to help those who were providing services to the needy
14 by giving funds to their employers, which in that case is
15 People Care, so that they could use them for recruitment
16 and retention, not to any of the components in this
17 contract that we have. And that's the - - -

18 JUDGE RIVERA: Yes, as I understand - - - and you
19 will correct me if my understanding is wrong. As I
20 understand it, that is the legislature's concern with
21 inappropriately low wages for people who provide these
22 services and to ensure that you get quality services going
23 to the individuals who are the Medicaid recipients,
24 correct?

25 MR. FLEMING: Well, but I don't think the



1 legislature's concern was limited to wages because they - -
2 - otherwise they would have just said use it as additional
3 compensation, and we weren't required to use it as
4 additional compensation. It could be used for training
5 programs, anything that would provide for recruitment. All
6 of those were valid services.

7 And I would ask the court to - - - I think the
8 First Department, really the majority there, did get it
9 correct when they observed that the contracts we have do
10 provide for amendment if the Department of Health changes
11 the method of reimbursing the contractor. And I submit
12 that's what happened here. They changed the method. We
13 weren't getting paid on the allowable payment formula with
14 a profit margin or anything like that. We were getting
15 paid as a pass-through for a specific purpose which was
16 recruitment and retention. And that's what they did and
17 that the audit and other powers of that associated with
18 those pass-throughs remained with the Department of Health,
19 which is what the MOU indicates and what the statute
20 indicates.

21 And I see I'm out of time, Your Honor. If the
22 court has any more questions, I would be glad to help them,
23 and I ask the court affirm the First Department ruling.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 Mr. Lee, what is the harm if it were determined



1 that the audit of the HCRA funds must be done by DOH and
2 not by the local authority, so to speak?

3 MR. LEE: Here's the harm, Your Honor, and it's
4 two-fold. One, People Care, in this very litigation, has
5 actually argued that DOH does not have the authority to
6 audit any of the money except for the HCRA funds, and they
7 have said that they are subject to a six-year statute of
8 limitations. In other words, my opponent has here said DOH
9 could at any time decide to audit.

10 That's actually not true. That's at page 181 of
11 the record they argue that DOH is barred. And so basically
12 they have litigated this case such that DOH can't actually
13 audit. And in fact, DOH has told us we are not going to
14 audit because we trust you. You have the expertise. They
15 have approved our contracts and our way of doing things,
16 which is a lower, more cost-effective rate, since 1981.
17 That's four decades that they have trusted us to do this.

18 There is no need and it makes no sense to
19 interpret a statute where the legislature was very much
20 concerned about fraud. And I think this case is emblematic
21 of that to say, oh, yeah, the legislature is going to
22 unilaterally disarm the ability of the State to work with
23 their local agencies who best know their providers to say
24 we don't want you to audit. I just don't think that
25 squares, frankly, with the legislative intent. And that -



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JUDGE GARCIA: Chief Judge, may I ask a question?
Counsel, could you, as part of that answer,
address your adversary's point on the harm to his client by
allowing you to audit - - - your client to audit?

MR. LEE: Absolutely. I think his argument rests
on the fact that it's done on an annual basis, and that's
not a harm here. In fact, the State and HRA have taken the
position that all Medicaid money needs to be audited on an
annual basis. This is government money. That's how it
works. If it's not spent on the needy; it gets reallocated
and the State takes it back and uses it for other purposes.

And my client tells me that when we audit the
HCRA funds and we audit what he calls the regular Medicaid
funds, it's not segregated. It all goes to the same bank
account and the State credits that as Medicaid money. So
he's saying that they didn't know it's done on an annual
basis. But the basis - - -

CHIEF JUDGE DIFIORE: Mr. Lee, you've frozen.
Well, your light's on anyway. Thank you very
much.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of People Care Incorporated v. The City of New York Human Resources Administration, et al., No. 13, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

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