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

PRESENT: DEBRA A. JAMES **PART 59**
Justice

In the Matter of THE CITY OF NEW YORK
Petitioner,

- v -

ANTONIA C. NOVELLO, as Commissioner of the New York State Department of Health, and THE NEW YORK STATE DEPARTMENT OF HEALTH,
Respondents.

Index No.: 400705/05
Motion Date: 08/26/05
Motion Seq. No.: 01
Motion Cal. No.: 28

The following papers, numbered 1 to 10 were read on this Article 78 petition.

	PAPERS NUMBERED
Amended Notice of Petition/Petition -Affidavits-Exhibits	1, 2
Verified Answer - Exhibits	3,4
Replying Affidavits - Exhibits	5,6
Sur-Replying Affidavits	7,8
Sur-Sur-Replying Affidavits-Exhibits	9,10

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

The petitioner City of New York (City) brings this CPLR Article 78 proceeding seeking to challenge the October 29, 2004 determination of respondent New York State Department of Health (State agency) subjecting the City to an additional intercept of over 27 million dollars due from New York State (state) to the City for home care services reimbursements pursuant to Laws of 2003, ch 62, Pt. Z2, §26 (amending L. 1997, ch 43, §36, hereinafter the "statute").

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

Check One: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

The statute concerns "the rate of reimbursement paid to hospitals and residential health care facilities" by the state and requires the State agency to employ a methodology set forth in the statute for the purpose of "developing district-specific targets to enhance incentives for the efficient management of home care services." The City is one of the enumerated districts. The statute defines the base period "for target calculation purposes, as July 1, 1996 through March 31, 1997;" the target period over which the savings are to be measured runs from July 1 to March 31.

Under the statute, on January 1 of each year the State agency is to notify districts of their progress toward reaching the savings targets. On March 1 of each year the State agency is to notify again districts as to the progress made toward reaching the savings target; the amount, if any, by which the State agency projects that the district will not reach the savings targets; and the amount, if any, of the state payments to be "intercepted" by the State agency. The State is authorized to intercept on or before March 31 of the target period the amount that it projects a district will fall short of its savings target. The statute further states with relevance to the instant petition that

> As soon as practicable after March 31, 2001 and as soon as possible after March 31 of each year thereafter up to and including March 31, 2005, the department of health shall determine the actual home care services state share medical assistance savings achieved by a district. . . In the case of a district for which, pursuant to

> subdivisions 4 and 5 of this section, either no intercept, or an insufficient intercept, of state funds was made, if the department determines that such district failed to achieve savings sufficient to meet its home care services state share medical assistance savings target, the department shall as soon as possible, **but in no event later than three months after the end of the target period**, intercept state payments for public assistance and care and any other payments otherwise to be made to such district in an amount sufficient to reimburse the state for the savings target.

L. 2003, ch 62, pt Z2, §26. Emphasis added.

In this case, the State agency sent the City a letter dated March 11, 2004, setting forth the City's progress towards the savings targets and projecting that the City would be subject to approximately $1.3 million in intercepts. The City objected to the State agency's calculations. Subsequently, by letter dated October 29, 2004, the State agency determined that the City would be subject to an additional intercept of over $27.3 million based upon further expenditure information.

The City's petition alleges that (1) the State agency lacked the authority to make any intercept for the target period because of its failure to comply with the statutory time frames, (2) the State agency failed to perform the required reconciliation within the time frame provided by the statute and therefore was not authorized to retain the March 2004 intercept, and (3) the State agency's calculation of the intercept is arbitrary and capricious. The State agency opposes the motion.

For the reasons that follow, the court agrees with the City that the determination of the State agency as to the additional

intercept is affected by an error of law and to that extent shall grant the CPLR Article 78 Petition.

"The standard of review in such a proceeding is whether the agency determination was arbitrary and capricious or affected by an error of law. It is the settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency." Scherbyn v Wayne-Finger Lakes Bd. of Co-op. Educational Services, 77 NY2d 753, 758 (1991); See CPLR 7803 (3).

The City's first argument is that the State's non-compliance with the time limitations set forth in the statute deprived the State of the authority to carry out the additional intercept of funds. This argument raises the issue of whether the time limits in the statute are mandatory or merely directory.

Statutes § 171 states that "Mandatory provisions of a statute go to the jurisdiction of the person acting, while directory provision are mere instructions or directions."

Of additional assistance in this regard is Statute § 96, which provides that "A basic consideration of the interpretation of a statute is the general spirit and purpose underlying its enactment, and that construction is to be preferred which furthers the object, spirit and purpose of the statute."

Correlating these two principles:

> Whether a given provision is mandatory or directory is to be determined primarily from the legislative intent gathered from the entire act and the surrounding circumstances, keeping in mind the public

> policy to be promoted and the results that would follow one or the other conclusion. In this regard, however, it is said that legislative intent does not depend upon the language in which the intent is clothed, and the fact that a statute is framed in mandatory words such as "shall" or "must," is of slight, if any importance on the question whether the act is mandatory or directory. Statutes § 171, p. 334

Examining the provision in question by utilizing these two principles of construction, it is clear that the Legislature intended the statute to create incentives for districts to implement measures that would result in savings and thereby reduce the cost of home care services that are funded in part by the State. The yearly threat of undergoing an intercept of certain state funds due to the particular district for reimbursement of those costs was the incentive set up by the statutory framework. It is axiomatic that a fundamental feature of this incentive plan is its ability on an annual basis to motivate each district to compare its progress on cost savings and to adjust and implement measures accordingly.

In King v Carey, 57 NY2d 505 (1982), the Court of Appeals interpreted as "time of the essence" a thirty to ninety day time frame for public officials to assess a penalty payroll deduction against any employee who participated in an illegal strike under the Taylor Law. The court reasoned

> In short, the time requirements imposed on public officials by the Taylor Law are not "unessential particulars"; they are *an integral and central part* of the statutory scheme which carries out the Legislature's judgment that swift punishment is

> essential to deter further strikes by public employees. (Emphasis supplied.) 57 NY2d at 514

So too here, the annual time requirement is a key part of the statutory regime. To allow the State agency to disregard the time restriction for the second and final intercept would undermine the district's ability to annually evaluate the efficiency of the provision of home care services and monitor the effectiveness of cost saving measures. At its extreme, were the State agency permitted to ignore the time period for the final intercept, there would be nothing to prevent the State agency from delaying the additional intercept for twelve months after the target period. Such delay would enable the State to randomly and arbitrarily carry out multiple intercepts within one particular target period. Such circumstances would make it impossible for the district in question to effectuate any meaningful annual savings plan.

Statutes § 98(a) entitled "Generally" provides

> All parts of a statute must be harmonized with each other as well as with the general intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof.

The State agency's reading of the provision also violates this second principle of construction. Reading the statute as a whole, the Legislature used the term "as soon as possible after March 31, 2001" and "as soon as practicable after March 31 of

each year thereafter" to qualify the period after which the State agency must determine actual home care services savings achieved by each district. In contrast, with respect to any second intercept, the Legislature while again using the words "as soon as possible", did not continue with the phrase "and within three months after the target period." Instead, it stated "but in no event later than three months after the target period."

The State agency's interpretation of the latter language as directory and not mandatory renders that provision devoid of any meaning. The State agency's argument is in essence that the words "but in no event later than three months after the target period" have the same meaning as "and within three months after the target period." Following the State agency's logic, the phrase "but no later than" makes no difference, and has no meaning.

Applying this principle, the City is correct that the language "but in no event later than three months after the end of the target period" compels the conclusion that the time frame enumerated in the statute is, by its plain and clear language, mandatory. This is consistent with another principle of statutory construction, which is set forth in Statutes § 76: "Where words of a statute are free from ambiguity and express plainly, clearly and distinctly the legislative intent, resort may not be had to other means of interpretation."

Further support for the jurisdictional nature of the "but no later than" language and consistent with harmonizing all parts of the statute and giving effect to each part and word of the provisions is the long line of prior precedent, cited by the City, that provides that the Legislature's use of "negative language," such as the words "no," "not" or "cannot," signifies that the deadline is mandatory and may not be disregarded. In addition, as stated above, the negative language is coupled with affirmative language, thereby rendering the negative language mandatory. See In re Petition of Douglass, 46 N.Y.42 (1871); Radimak v Nassar, 119 A.D.2d 978 (4th Dept. 1986).

Distinguishable is Grossman v. Rankin, 43 NY2d 493 (1977), where the language pertaining to the Civil Service Commission used by the Legislature was affirmative, requiring the commission to study and evaluate any exempt position and determine whether it was properly classified as exempt within four months of the occurrence of a vacancy in that position.

While the court shall grant the City relief with respect to respondent's October 29, 2004 determination, as it finds such proposed intercept to be prohibited under the statutory regime, it finds that the City has failed to demonstrate that the State agency's calculation of savings targets and intercepts in its March 24, 2004 notice is arbitrary.

As argued by respondent, the statute itself sets the base year for the calculation. Furthermore, the City's argument that it has no control over the cost factors that go into the calculation has no bearing on the determination of whether the State agency acted rationally. It is telling in this regard that the City does not argue in its petition that the State agency's calculations are contrary to the statute. The touchstone for a rationality determination is the State agency's compliance with the statute. To the extent that the State agency acting under the authority granted by the statute utilizes factors the City asserts it should not, the City's remedy is not in the courts but in the legislative forum. The court also takes cognizance of the respondent's argument that the methodology utilized by the State agency has not changed since the original enactment of the statute in 1997 and the City has not previously challenged the methodology.

As the court finds the City has failed to carry its burden of demonstrating that the March 24, 2004 determination was irrational, the court shall deny the petition with respect to the $1,391,461 intercept made by respondent.

Accordingly, it is

ORDERED and ADJUDGED that the Petition is GRANTED to the extent that the respondent's October 29, 2004 determination is

affected by an error of law and is hereby ANNULLED; and it is further

ORDERED and ADJUDGED that the Petition is otherwise DENIED and DISMISSED.

This is the decision and order of the court.

Dated: February 9, 2006 ENTER:

DEBRA A. JAMES J.S.C.
J.S.C.