Matter of Barele, Inc. v City of N.Y. Human Resources Admin., Dept. of Social Servs.
2010 NY Slip Op 30760(U)
April 2, 2010
Supreme Court, New York County
Docket Number: 110138-2009
Judge: Carol R. Edmead
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[* 1]
SCANNED ON 4/7/2010

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

PRESENT: HON. CAROL EDMEAD PART 35
Justice

Index Number : 110138/2009
BARELE INC. D/B/A OMEGA HOME
VS.
CITY OF NEW YORK HUMAN
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. ____
MOTION DATE 3/8/10
MOTION SEQ. NO. ____
MOTION CAL. NO. ____

On this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

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).

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the petition to (i) prohibit and enjoin the enforcement of two Appeal Determinations rendered by respondent City of New York Human Resources Administration against petitioners, (ii) vacate and annul the Appeal Determinations, and (iii) vacate and annul the determinations dated October 20, 2008 made by City of New York Human Resources Administration to recoup funds from petitioners is denied; and it is further

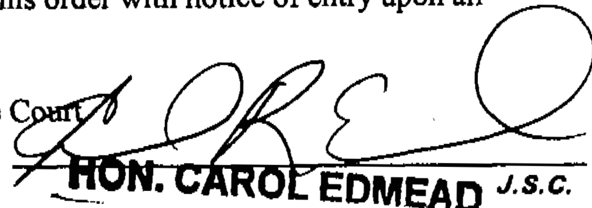
ORDERED that the motion by respondents to dismiss the petition is granted; and it is further

ORDERED and ADJUDGED that petition is dismissed; and it is further

ORDERED that petitioners serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitute the decision and order of the Court.

Dated: 4/2/10



HON. CAROL EDMEAD J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

---X

In the Matter of the Application of:

BARELE, INC. d/b/a OMEGA HOME HEALTH CARE and PREMIER HOME HEALTH CARE SERVICES, INC. d/b/a FIRST AIDE HOME CARE,

Index No. 110138-2009

Petitioners,

For a Judgment Pursuant to Article 78 of the N.Y. Civil Practice Law & Rules,

-against-

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).

THE CITY OF NEW YORK HUMAN RESOURCES ADMINISTRATION, DEPARTMENT OF SOCIAL SERVICES; and ROBERT DOAR, in his official capacity as Administrator of the City of New York Human Resources Administration and Commissioner of Social Services,

Respondents.

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HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioners Barele, Inc. d/b/a Omega Home Health Care ("Omega") and Premier Home Health Care Services, Inc. d/b/a First Aide Home Care ("First Aide") (collectively, "petitioners") seek to (i) prohibit and enjoin the enforcement of two Appeal Determinations rendered by respondent City of New York Human Resources Administration ("HRA") against them, which affirmed HRA's demands to recoup approximately $4.9 million and $1.2 million, respectively, in Medicaid reimbursements concerning funds disbursed to petitioners, (ii) vacate and annul the Appeal Determinations on the grounds that they are *ultra vires*, irrational, arbitrary and capricious, and (iii) vacate and annul the determinations dated October 20, 2008 made by HRA to recoup funds from petitioners.

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Factual Background

New York State provides "personal care services" known as the "Home Attendant Program" under its federally funded Medicaid program. HRA administers the Medicaid program in New York City. Petitioners have entered into contracts with HRA to provide personal care services to medical assistance recipients residing in Brooklyn (the "Contracts").

In 1994, the New York State Department of Social Services, now New York State Department of Health ("DOH") imposed a "cost-based" methodology for calculating Medicaid reimbursement rates, which takes into account the provider's actual cost of providing personal care services. However, HRA received an exemption from this cost-based reimbursement methodology to make Medicaid reimbursements to providers pursuant to an "Alternative Rate Methodology" ("ARM"). HRA's approved ARM is incorporated into the Contracts, and is entitled, after conducting an audit, to recover from a provider the amount of Direct Labor revenues earned from reimbursements made under the ARM in a fiscal year, less the provider's audited Direct Labor costs for that fiscal year.

In 2002, the New York State created a new Medicaid reimbursement program, the Personal Care Worker Recruitment and Retention Program (the "Recruitment and Retention Program") under the Health Care Reform Act of 2000, as amended ("HCRA") (N.Y. Public Health Law ("PHL") § 2807-v(l)(bb); N.Y. Social Services Law § 367-q; 2002 N.Y. Laws, Ch. 1, p. 1635). PHL §2807-v provided that New York State would disburse funds for recruitment and retention of personal care service workers ("HCRA Funds") and that these funds would be computed and distributed in accordance with the memoranda of understanding (the "MOU") that New York State would enter into with LSSDs, such as HRA.

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The MOU between New York State and HRA provides that "DOH may audit each provider receiving such a rate adjustment to ensure compliance with the provisions of such statute" (PHL §2807-v(l)(bb)). Further, PHL §2807-v(l)(bb)(iii) empowers the New York State Commissioner with audit powers to ensure compliance and the limited ability to recoup "funds determined to have been used for purposes other than recruitment and retention. . . ."

On October 20, 2008, HRA determined pursuant to its audit, close-out and funds recovery analyses conducted under the ARM, that petitioners were required to repay certain Medicaid reimbursement payments received in fiscal years 2002 through 2004. HRA's demand for recoupment included HCRA Funds awarded under the Recruitment and Retention Program.[1]

Petitioners appealed the determinations that related to the HCRA Funds.

On March 24, 2009, HRA denied that part of petitioners' appeals concerning HCRA Funds in final Appeal Determinations stating:

> . . . .HRA's Appeal Determinations correctly acknowledged that "there is no specific provision in Public Health Law § 2807-v(i)(bb) [sic] that specifically states the HCRA funds are to be expended by the provider within the calendar year received or within the New York City fiscal year received. . . .
>
> . . . HRA asserted its demand for recoupment of those HCRA Funds on the purported ground that "HRA has confirmed that the [DOH] position is that HCRA funds are Medicaid revenues and if they are not expended in the fiscal year received, and if there is no ongoing plan and process in place for expending funds for the authorized purposes, those funds must be returned to HRA.
>
> Although there is no requirement in the HCRA statute that Petitioners have an "ongoing plan and process" for the use of HCRA Funds and HRA's auditors never asked for one, HRA claimed that Petitioners "did not present or provide documentation of an ongoing plan and process in place for expending the HCRA funds for the purposes intended [and that Petitioners] did not provide documentation of any collective bargaining agreement

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[1] Petitioners do not challenge HRA's demand for recoupment of reimbursements received by petitioners based on application of the audit methodology contained in the ARM.

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("CBA") effective for FY-2003 or FY-2004 or any CBA going forward. Therefore, those funds must be returned to HRA.

In support of the instant petition, petitioners argue that HRA exceeded its jurisdiction in auditing HCRA Funds and its resultant audit, close out and recovery analyses and demands for recoupment are *ultra vires*, arbitrary, capricious, irrational and contrary to law.

By auditing petitioners' use of HCRA Funds, HRA has exercised jurisdiction which belongs exclusively to DOH. PHL §2807-v(l)(bb)(iii) empowers only the New York State Commissioner with audit powers to recoup funds which have been used for purposes other than recruitment and retention. DOH has never delegated that audit function to HRA or authorized HRA to include HCRA Funds in its audits conducted to determine the adequacy of reimbursements made pursuant to the ARM. Further, the MOU executed by DOH and HRA which governs HRA's administration of HCRA Funds, expressly reiterates DOH's reservation of its exclusive jurisdiction, duty and authority to audit the use of HCRA Funds.

Although 18 N.Y.C.R.R. 505.14(c)(6) requires HRA to "have a plan to monitor and audit the delivery of personal care services provided pursuant to its contracts or other written agreements, petitioners' ability to recruit and retain personal care services workers using HCRA Funds has nothing to do with petitioners' "contracts or other written agreements" with HRA. HCRA Funds is a separate and distinct funding source.

Even assuming HRA possessed jurisdiction to audit petitioners' use of HCRA Funds, that audit is limited by PHL § 2807-v(l)(bb)(iii) to "ensure compliance with the written certification required by [PHL §2807-v(l)(bb)(i)]." The health care provider's written certification is required merely to confirm "that such funds will be used solely for the purpose of recruitment and

retention of non-supervisory personal care services workers or any worker with direct patient care responsibility."

Further, sections 3.2, 1.4, and 2.3 (B) of the Contracts indicate that HRA's audit, close-out and recovery process outlined in the Contracts applies by its terms to funds received in excess of Allowable Payments under the ARM, and is intended to apply only to those Medicaid rates established by HRA under the ARM. "Allowable Payments" under the ARM do not include HCRA Funds, since HCRA Funds are neither part of "this Agreement" or included in petitioners' approved budgets. Petitioners receive and hold the HCRA Funds pursuant to the methodology set forth under a different statutory authority, PHL §2807-v(l)(bb). The HCRA Funds were not even appropriated by the State until after the Contracts were executed, and disbursements to providers of HCRA Funds were not calculated using the contractual methodology under ARM. The contract methodology for audit, close-out and recovery of funds received pursuant to the ARM was never contemplated to be and is not applicable to the separate HCRA Funds. HRA's apparent need to consult with DOH after it issued the October 28, 2008 demand to determine DOH's "position" reaffirms that DOH is the exclusive administrator of HCRA Funds.

Additionally, HRA does not seek recoupment based on how the HCRA Funds were used, but on the ground that the funds must be expended in the fiscal year received, and there is no statute, rule, regulation or officially communicated DOH guideline or policy for this position, as admitted by HRA. Substituting its own standard for the statutory standard was arbitrary and capricious and the Appeal Determinations lack any rational basis in law.

HRA also failed to comply with applicable procedural rules requiring that HRA furnish timely notice to the regulated community of the grounds upon which the agency would seek

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recoupment of HCRA Funds. Since HRA's auditors never raised the additional "plan and process" requirement during the audit process, the agency cannot now rely on it as a basis of the recoupment demand. Had HRA timely inquired as to a plan and process, petitioners would have advised that petitioners had a plan of recruitment and retention of personal care service workers for wages and benefits enhancements as approved by the union in a Collective Bargaining Agreement ("CBA") with SEIU Local 1199 for Home Attendant workers.

Further, the agency's enforcement of an unpublished rule, is a clear violation of both Article IV of the New York State Constitution and Section 102 of the State Administrative Procedures Act ("SAPA") in that neither the temporal requirement nor the "plan and process" requirement were subjected to notice and comment as required. HRA's Appeal Determinations purport "to attach certain conditions to the application of Public Health Law 2807-v(l)(bb)(iii) - *i.e.*, that HCRA Funds must be expended in the fiscal year awarded, or be the subject of a plan or process for such expenditure - creating a fixed general principle subject to SAPA. The temporal and "plan and process" requirements are being applied by HRA as fixed, general principles without regard to other facts and circumstances relevant to the underlying regulatory scheme. The alleged standards, and the results of the audit, are therefore irrational and contrary to law.

HRA moves to dismiss the petition, arguing that the Court lacks subject matter jurisdiction over petitioners' claims. HRA argues that the Court need not reach the merits of this proceeding because the resolution of the dispute at issue is exclusively governed by alternative dispute resolution ("ADR") provisions in Part II, Art. 8-15 of the Contracts and the Rules of the New York City Procurement Policy Board ("PPB") to which petitioners are contractually bound. The ADR provisions prescribe a three-step process for resolving contract disputes. HRA points

out that in petitioners' November 12, 2008 letters contesting the audits, petitioners specifically invoke the ADR. Thus, petitioners cannot ignore the ADR provisions and treat the March 24, 2009 letters as constituting a final agency determination subject to Article 78 review.

Moreover, the March 24, 2009 letters are not final determinations subject to review by this Court. The letters constitute an "action or determination" within the meaning of the Contracts' dispute resolution provisions. Under Part II, §8.15, petitioners were required to initiate ADR by filing a notice of dispute with the Agency Head of HRA. If unresolved, it proceeds to the Comptroller. If still unresolved, petitioners can seek a review of the agency determination by the Contract Dispute Resolution Board ("CDRB"). Pursuant to the provisions of PPB Rule §4-09(g), a decision of the CDRB is final and subject to an Article 78 Proceeding. Having abandoned ADR at the inception, petitioners' time for engaging in the ADR process has long since expired and cannot belatedly be pursued now.

In any event, a dispute concerning the return of unspent funds invokes the provisions of Article 3, §3.2, in which petitioners agreed "not to commence any action at law or in equity, or any proceeding pursuant to C.P.L.R. Article 78, against the Department, the City, the State . . . to review the determination of the Department of the amount of Allowable Payments or to review the determination of the Department to reduce or increase the Rate as set forth in Article 3.1 or 3.2 of Part I of this Agreement." Petitioners agreed that the "sole remedy shall be to initiate dispute resolution pursuant to Article 8.15 of Part II of this Agreement."

Even if petitioners are not barred by the ADR provisions of the Contracts, dismissal is required as petitioners failed to exhaust their administrative remedies by following the three-step procedure. Although the procedure need not be followed when an agency's action is challenged

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as wholly beyond its grant of power, HRA's audit and recoupment functions are clearly within HRA's power as set forth in the Contracts. Further, the Contracts broadly define funds and petitioners' attack does not exempt it from exhausting its administrative remedies. Petitioners cannot argue that HRA has the power to give it money, but only audit and recoup the use of some of the money, and not audit or recoup overpayment of other monies.

HRA further contends that Article 4, Part II of the Contracts and the expansive definition of "funds" as "money or anything of value transferred by the Department . . . to the Contractor" gives HRA broad powers to audit Contract funds.

Even assuming this proceeding is properly before the Court, petitioners' failure to join the DOH, an indispensible party, warrants dismissal pursuant to CPLR 1001(a). Petitioners challenge DOH's interpretation of the applicable statutory scheme, and its right to both conduct audits of funds received by petitioners and delegate that authority to HRA. If petitioners are successful here, the State will lose the millions of dollars at issue.

In reply, petitioners argue that Article 8.15 is not an ADR process, but an administrative review process subject to Article 78 and the petition properly seeks to prevent HRA from proceeding in excess of jurisdiction pursuant to CPLR 7803(3). A party need not exhaust administrative remedies of an agency that lacks jurisdiction in the first instance, as petitioners allege here. The doctrine of exhaustion of remedies does not bar an Article 78 proceeding to review or prevent an agency's determinations made in excess of its jurisdiction.

It is also argued that HRA's claim that the court lacks jurisdiction because petitioners failed to complete the contract dispute process lacks merit. If Article 8.15 were a true ADR provision, then review and vacatur would be the subject of a CPLR Article 75 proceeding, and

not the Article 78 proceeding set forth in the parties' Contracts. Even so, a party cannot be compelled to engage in ADR where the arbiter lacks jurisdiction or acts in excess of its authority.

Further, even under ADR theories, the audit and recoupment provisions of the parties' Contracts do not apply to HCRA Funds; the contract dispute provisions are therefore inapplicable and any body which proceeds thereunder would lack jurisdiction to determine the dispute. The audit, close-out and funds recovery jurisdiction granted to HRA in the Contracts between petitioners and HRA is expressly limited to "Funds" petitioners received under the Medicaid rates established under the contractually based and State ARM, which is separate and apart from the HRCA Funds. Section 3.2 of the Contracts do not give HRA the power to audit or demand recoupment of HRCA Funds, and the instant dispute regarding its claimed ability to do so cannot be said to arise under or by virtue of the Contracts with HRA. Requiring petitioners to pursue claims outside the scope of HRA's jurisdiction and allowing HRA to render determinations that will be vacated upon judicial review is also an exercise in futility that will do nothing but squander the resources of both parties.

Even assuming HRA had jurisdiction, HRA never followed the Contracts' provisions and administrative remedies upon which respondents' motion is premised. HRA never followed the appeal provisions which are the basis for its contention that petitioners failed to exhaust administrative remedies. HRA's October 20, 2008 determinations issued by Arnold Ng, HRA's Director, Management and Program Support for Home Care Services Program ("Ng"), specifically required that any appeal must be made to his attention within two weeks of the date of his letter. However, the Contracts provide petitioners with a minimum of 30 days to dispute HRA's determinations. Further, HRA failed to identify the correct party to whom the appeal

must be addressed, in that Part II, Section 8.15, requires that appeals are to be made solely to the "Agency Head', *i.e.*, Robert Doar, not Ng.

Petitioners' November 12, 2008 Notice of Dispute demanded an expanded and formal review process to demonstrate that HRA was not entitled to recoup HCRA Funds and that unexpended HCRA Funds would be expended on retention and recruitment activities in accordance with HCRA. HRA, however, refused to follow the Contracts appeal provisions; HRA did not render its Appeal Determinations until 132 days later on March 24, 2009, and such Determinations were issued by "Michael A. Porcello, Agency Attorney," without any statement concerning how the decision may be appealed" all in violation of Part II, Section 8.15 (D)(3).

Further, where exhaustion of administrative remedies would be futile, courts will not require that petitioners comply with them before commencing an Article 78 Proceeding. In April 2009, petitioners sent a second Notice of Dispute to HRA advising that it would commence an Article 78 proceeding to vacate the March 24, 2009 Appeal Determinations and asserted that the proposed recovery by HRA of the Recruitment and Retention Program funds should be reversed. Respondent Doar, however, did not act on the second Notice of Dispute and once again HRA declined to follow the Contract provisions and proceed with administrative remedies. Pursuant to Part II, Section 8.15(D)(1) respondent Doar must endeavor to collect "all materials he or she deems pertinent to the dispute." Thereafter, "either party may demand of the other the production of any document or other material the demanding party believes may be relevant to the dispute." Yet, Doar took none of these steps nor conducted any investigation into petitioners' claims raised in the April 24, 2009, Notice of Dispute. More importantly respondents Doar and HRA did nothing to render a determination to this day.

And, respondents' claim that petitioners should have appealed to the "Comptroller" and thereafter to the "Contract Dispute Resolution Board ("CDRB")" and that an Article 78 proceeding was barred until after a CDRB determination, lacks merit, as there was nothing to appeal from. The first step in the so-called "three-stage process" would have been a determination by the "Agency Head" of the April 24, 2009 Notices of Dispute, which never occurred. Thus, petitioners had to commence this proceeding within four (4) months of the March 24, 2009 Appeal Determinations. The process was "abandoned" by HRA, not petitioners, which fulfilled their sole obligation to file Notices of Dispute. There is no excuse for the Doar's failure to act on petitioners' Notices of Dispute, unless, of course, respondents concede that such Notices do not pertain to matters within the scope of the parties' Contracts, *i.e.*, that HRA's determinations were rendered pursuant to audit and closeout procedures that are outside of the parties' Contracts. Exhaustion of administrative remedies proved futile to petitioners and the law therefore does not bar this Article 78 proceeding.

Finally, DOH is not a necessary party in this proceeding. Petitioners never claimed that DOH should be deprived of such audit jurisdiction over HCRA Funds, and the Petition seeks no relief from DOH. Nothing in any judgment by the Court would preclude DOH from conducting the audits or inequitably affect DOH, and the Court may grant complete relief between petitioners and respondents. DOH has never sought intervention and has not objected to the proceeding going forward in its absence. The Court also has discretion to proceed in DOH's absence or may add DOH as a party pursuant to CPLR 7802(c) upon leave by a party, which petitioners will seek should the Court determine that HRA is a necessary party.

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Discussion

Proceeding Barred By ADR Provision

Arbitration and other alternative procedures for resolving disputes are creatures of contract, and while the law favors such alternatives to litigation, a party will not be denied judicial resolution of a controversy unless it falls within the governing ADR provision (*FCI Group, Inc. v City of New York*, 54 AD3d 171, 862 NYS2d 352 [1st Dept 2008] *citing Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 95, 371 NYS2d 463 [1975]). A court will not order a party to submit to arbitration absent evidence of "that party's unequivocal intent to arbitrate the relevant dispute," and unless the dispute is clearly the type of claim that the parties agreed to refer to arbitration (*Brady v Williams Capital Group, L.P.*, 64 AD3d 127, 878 NYS2d 693 [1st Dept 2009]). The threshold determination of "whether there is a clear, unequivocal and extant agreement to arbitrate" the disputed claims is to be made by the court and not the arbitrator (*id.* at 131). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms *(see e.g. R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32, 744 NYS2d 358, *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]). A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *rearg denied* 46 NY2d 940, 415 NYS2d 1027 [1979]). Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity (*see e.g. Teichman v*

Community Hosp. of W. Suffolk, 87 NY2d 514, 520, 640 NYS2d 472 [1996]; *First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630, 638, 290 NYS2d 721, rearg denied 22 NY2d 827, 292 NYS2d 1031 [1968]).

Ultimately, the aim is a practical interpretation of the language employed so that there be a realization of the parties' "reasonable expectations" (*see Sutton v East River Sav. Bank*, 55 NY2d 550, 555, 450 NYS2d 460 [1982]).

There is no dispute that HRA may conduct an audit to determine whether the recoupment of amounts due HRA is permissible. The ability to audit and recoup falls squarely within the language of the Contracts. As such, the acts of HRA in auditing and recouping funds do not violate the Contracts.

Nor can it be said that HRA's audit and recoupment of HRCA Funds is *ultra vires*. Clearly, HRA administers DOH's federally subsidized Medicaid program for personal care providers such as petitioners. The MOU between DOH and HRA provides that "Issuance of the Medicaid rate adjustments . . . to each personal care services provider [*i.e.*, petitioners] shall be subject to and conditioned upon NYCHRA's prior receipt from each such provider of a written certification that such funds will be used solely for the purpose of recruitment and retention of non-supervisory personal care services workers . . . ." which shall be forwarded to DOH. The Contracts between HRA and petitioners, in turn, permits HRA to determine the "Allowable Payments" and reduce of increase the "Rate." Part I, Article 3.2 provides that if HRA determines that petitioners have "received payments in excess of the Allowable Payments, then the Department [HRA] . . .may reduce the Rate or take other action . . . ." subject to the approval of DOH (Part I, 3.2(A), (C)).

Therefore, petitioners' jurisdictional challenge to the applicability of the ADR provision on the ground that HRA exceeded it authority is unavailing.

Turning to whether petitioners' dispute falls within the scope of the ADR provisions of the Contracts, Part II, Article 8.15 provides that

> All disputes between the City and supplier [petitioners] . . . that *arise under, or by virtue of, this Contract* . . . shall be finally resolved in accordance with the provisions of this section and Section 5-11 of the [PPB Rules]". The procedure for resolving all disputes of the kind delineated herein shall be the exclusive means of resolving any such disputes. (Emphasis added).

The procedure requires petitioners to submit the determination subject to dispute to the Commissioner and provides for review of such determination by the Comptroller and, ultimately, by the Contract Dispute Resolution Board, whose determination is subject to review under CPLR Article 78 (Article 8.15(D), (E), (G), *see also FCI Group, Inc.*, 54 AD3d at 174).

In Part I, Article 3.2(D), entitled "Reduction in Rate and *Recovery of Unspent Direct Labor Reimbursement*," the petitioners agreed not to commence an Article 78 proceeding "to review the determination of the Department of the amount of Allowable Payments or to review the determination of the Department to reduce or increase the Rate as set forth in Article 3.1 or 3.2 of Part I of this Agreement." Petitioners further agreed that their "sole remedy shall be to initiate dispute resolution pursuant to Article 8.15 of Part II of this Agreement." Allowable Payments include "those expenditures for labor . . . made by [petitioners] which are determined by the Department to be in accordance with this Agreement and the [petitioners'] approved budget." (Part I, Article 1.4)

The HRA's determinations in the form of the October 20, 2008 audits underlying the Appeal Determinations are clearly "determinations of the Department" falling under Part I,

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Article 3.2(D). It is undisputed that HRA's demands upon petitioners for recoupment of amounts due, based on the audits, seek to recover unspent funds and petitioners expressly agreed to subject a determination in this regard to the ADR process enunciated in Part II, Article 8.15 noted above. Whether HRA has the ability to audit and recoup HRCA Funds falls within the scope of the ADR provision. The Court notes that "Funds" includes "money or anything of value transferred by the Department [HRA] or MMIS [DOH's Medicaid Management Information System] or both, to the Contractor [petitioners] in accordance with this Agreement, and shall include, but *shall not be limited to Rate payments*." (Emphasis added). That HCRA Funds were not appropriated by New York State until after the Contracts were executed is inconsequential, since "Funds" is not limited to "Rate payments." Petitioners' distinction between funds petitioners' received under the Medicaid rates established under the ARM and HRCA Funds does not remove the claim that HRA cannot audit and recoup HRCA Funds from the scope of the ADR provisions. The funds petitioners receive from New York State's Medicaid program for personal care service workers, including HRCA funds, are administered through and by HRA, and thus, a dispute over such HRCA funds arise out of or is by virtue of the Contracts.

Although the language in ADR provisions of the Contracts are clear and unambiguous, the Court notes that petitioners initiated the very same ADR process, which they now argue are inapplicable, by serving letters on November 12, 2008. In these letters, petitioners expressly request an appeal of the October 20, 2008 demand "initiating the recovery process" "in accordance with . . . Part II, Section 8.15 entitled 'Resolution of Dispute'. As referenced in Section 8.15D.(1) please accept this letter as a formal "Notice of Dispute" regarding the amount due to HRA . . . ."

Therefore, the ADR provisions of the Contracts govern petitioners' claim as to whether HRA's audit and demand of recoupment of HCRA Funds were proper.

Failure to Exhaust Administrative Remedies

It is well-settled that a party objecting to an act of an administrative agency must exhaust his or her available administrative remedies before litigating in a court of law (*DeBlasio v City of New York*, 24 Misc 3d 789, 798, 883 NYS2d 843 [Supreme Court New York County 2009] citing *Watergate II Apartments v Buffalo Sewer Auth.*, 46 NY2d 52, 57, 412 NYS2d 821 [1978]). The exhaustion rule, however, "is subject to important qualifications. It need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, or when resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury (*Watergate II Apartments*, 46 NY2d at 57).

Petitioners' challenge to the HRA's determinations and Appeal Determinations does not exempt it from exhausting the administrative remedies set forth in Part II, Article 8.15 noted above. The power and authority to conduct an audit and seek recoupment from petitioners are within HRA's contractual authority. The propriety of HRA's determinations to recoup HRCA Funds as part of the funds HRA seeks to recoup overall, is the heart of petitioners' challenge, and this challenge must undergo the administrative procedures set forth in the Contracts.
The cases cited by petitioners are unpersuasive or distinguishable.

Here, petitioners submitted their Notices of Dispute on November 12, 2008. Although, as petitioners point out, HRA did not render its determinations within the 30-day period prescribed and the determinations were not issued by the "Agency Head," neither was petitioners' Notice properly addressed to the "Agency Head" respondent Doar as required. Instead, petitioners'

Notice was addressed to Ng. Thus, while petitioners claim that they are excused from exhausting administrative remedies due to respondents' failure to comply with the ADR provisions, petitioners commenced the ADR process with a noncompliant Notice.

Further, HRA's refusal to issue a determination within 30 days after the November 12, 2008 or the second Notice of Dispute dated April 24, 2010 did not render the ADR process futile. A "petitioner is not required to resort to and exhaust available alternative remedies where those remedies are futile; that is, rendered ineffectual because of delay, hardship, or clear indications that the respondent has already determined the outcome of those proceedings. In applying this principle, the court must carefully analyze each situation in light of its particular facts, balancing the general policy that an Article 78 be used only when other available remedies have been exhausted against the need to afford an adequate remedy to a petitioner aggrieved by unlawful official action" (*Sutterby v Zimar*, 156 Misc 2d 762, 594 NYS2d 607 [Supreme Court Yates County 1993]).

Here, Part II, Article 8.15(B) provides that the HRA's failure to "make such determination [required by this section] within the time required by this section shall be deemed a non-determination without prejudice that will allow application to the next level." Even assuming the November 2008 Notice was properly addressed, and that HRA failed in its duty to serve its determinations within 30 days of receipt of such Notice, under 8.15(B), petitioners had the right to pursue its claim to the "Comptroller" pursuant to 8.15(E), await 30 days, and then submit such claim to the CDRB if the claim was not "settled or adjusted by the Comptroller" within 30 days after the CDRB determination was to be issued (*i.e.*, 45 or 90 days 8.15 (G)(4)). There is no indication in the record of any delay, hardship, or predetermination by the

Comptroller or CDRB so as to render petitioners' compliance of ADR futile. The same holds true as to petitioners' second Notice of Dispute, dated April 2009.

Thus, petitioners claim that HRA's refusal to abide by the ADR provisions by failing to collect relevant documents or investigate the Notice, or issue a determination within 30 days is insufficient to excuse petitioners' compliance with the ADR provisions.

Thus, it cannot be said that HRA rendered petitioners' exhaustion of administrative remedies futile.

Therefore, having failed to exhaust the administrative remedies set forth in the Contracts, petitioners cannot maintain this Article 78 proceeding (*see Acme Supply Co., Ltd. v City of New York*, 39 AD3d 331, 834 NYS2d 142 [Supreme Court New York County 2007] (dismissing petition for failure of petitioners to submit its dispute to the Contract Dispute Resolution Board for the third-step review)).

Based on the foregoing, the Court does not reach the issues of whether the Petition is dismissed for failure to name a necessary party and whether the HRA's determinations and Appeal Determinations were arbitrary and capricious.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the petition to (i) prohibit and enjoin the enforcement of two Appeal Determinations rendered by respondent City of New York Human Resources Administration against petitioners, (ii) vacate and annul the Appeal Determinations, and (iii) vacate and annul the determinations dated October 20, 2008 made by City of New York Human Resources Administration to recoup funds from petitioners is denied; and it is further

ORDERED that the motion by respondents to dismiss the petition is granted; and it is further

ORDERED and ADJUDGED that petition is dismissed; and it is further

ORDERED that petitioners serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitute the decision and order of the Court.

Dated: April 2, 2010

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

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).