

**Consumer Directed Choices, Inc. v New York State
Off. of the Medicaid Inspector Gen.**

2010 NY Slip Op 33118(U)

November 5, 2010

Supreme Court, Albany County

Docket Number: 6000-10

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of

CONSUMER DIRECTED CHOICES, INC.,

Petitioner,

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

DECISION and ORDER
INDEX NO. 6000-10
RJI NO. 01-10-ST1787

-against-

NEW YORK STATE OFFICE OF THE
MEDICAID INSPECTOR GENERAL,

Respondent.

Supreme Court Albany County All Purpose Term, October 22, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Petitioner commenced this CPLR Article 78 proceeding challenging Respondent's withholding a percentage of its "current and future claims under the medicaid program."

Petitioner seeks to have the withhold vacated and the monies withheld released, claiming that Respondent's withhold was not based upon "reliable information" and its notice improperly failed to recite the circumstances under which the withholding will be terminated. Respondent answered, provided a copy of the record before the agency below, set forth an objection in point of law and submitted a factual affidavit in support of its challenged determination. Because Petitioner failed to demonstrate that Respondent's determination was irrational, arbitrary and capricious, the petition is denied.

This Court cannot disturb Respondent's withhold unless "it has no rational basis... or the action complained of is arbitrary and capricious." (Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]). Moreover, "courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise." (Meyers v. New York State Div. of Housing and Community Renewal, 68 AD3d 1518, 1519 [3d Dept. 2009], quoting Matter of Peckham v. Calogero, 12 NY3d 424 [2009]; Gignac v. Paterson, 70 AD3d 1310 [4th Dept. 2010]). The regulation at issue in this proceeding is 18 NYCRR §518.7, which sets forth both the substantive and procedural basis for Respondent's withhold.

Here, Petitioner's financial relationship with Respondent is uncontested. Respondent is an agency within the Department of Health, charged "with detecting and combating Medicaid fraud and abuse and maximize the recoupment of improper Medicaid payments." (Public Health Law §30). Petitioner, on the other hand, acts as a "fiscal intermediary" between chronically ill or physically disabled individuals (hereinafter "consumers") and their personal assistants and the

Medicaid program's Consumer Directed Personal Assistance Program (hereinafter "CDPAP"). (Social Services Law §365-f). While CDPAP allows consumers to hire supervise and terminate their assistants, Petitioner handles the consumer's payroll, the consumers' assistant's benefits and the corresponding Medicaid billing. Petitioner derives all of its income from Medicaid for acting as a fiscal intermediary, with Respondent withholding a portion of that income pursuant to 18 NYCRR §518.7.

On May 4, 2010, Respondent started withholding "twenty percent (20%) from each of [Petitioner's] payments for services and supplies." The stated reason for the withhold was because Respondent had "been informed by the Medicaid Fraud Control Unit of the New York State Office of the Attorney General (MFCU) that you [Petitioner] are the subject of an ongoing investigation for fraud and/or criminal conduct involving the Medicaid program." Petitioner objected, and in response Respondent reduced the withhold to "ten percent (10%)." Again, Respondent's stated reason for the withhold was due to its being informed by the MFCU that Petitioner is "the subject of an ongoing investigation for fraud and/or criminal conduct involving the Medicaid program."¹

On this record, Petitioner failed to demonstrate that Respondent's notices were defective. A withhold is "temporary" and the notice of withhold must "recite the circumstances under which the withhold will be terminated." (18 NYCRR §518.7[d] and [c][2]). Respondent's notices both stated that the withhold "will continue until such time as an amount reasonably calculated to satisfy the overpayment is recovered, pending a final determination of the matter."

¹ It now appears that, since this proceeding was commenced, Respondent has suspended the withhold "until further notice" pursuant to a Memorandum dated September 27, 2010.

While such withhold termination language is far from precise and specifically applies to audits² not at issue here, it is substantially similar to the 18 NYCRR §518.7(c)(2) notice language approved by the Appellate Division - Third Department in Kasin v. Novello (303 AD2d 910, 913 [3d Dept. 2003])[examining “[t]his withhold will continue until such time as the calculated Medicaid overpayment has been repaid”). Moreover, Kasin’s withhold was also initiated by the MFCU and the Court did not confine its analysis to 18 NYCRR §518.7(c)(2)’s constitutionality. As such, Petitioner failed to demonstrate that the Respondent’s notice of termination of its withhold was defective, arbitrary or capricious.

Petitioner similarly failed to demonstrate that Respondent’s withhold was not based on “reliable information” in accord with 18 NYCRR §518.7(a). “Reliable information may consist of... information from a State investigating or prosecutorial agency... of an ongoing investigation of a provider for fraud or criminal conduct involving the program...” (18 NYCRR §518.7[a]). In strict conformance with such regulation, MFCU³ informed Respondent that they were “conducting an ongoing investigation of [Petitioner] for fraud...” With such information, Respondent imposed the withhold.

Contrary to Petitioner’s contention, Respondent’s reliance on MFCU’s withhold request was not irrational, arbitrary or capricious. Respondent interprets and construes 18 NYCRR §518.7(a)’s “reliable information” provision strictly, requiring only a State investigating agency to inform it of an ongoing investigation for fraud. As the regulation’s plain language requires no more, such interpretation is not wholly irrational and must be deferred to by this Court. (Meyers,

² 18 NYCRR §518.7(d)(1 and 2)

³ It is uncontested that MFCU is a “State investigating or prosecutorial agency.”

supra). As such, Petitioner's submission of proof challenging MFCU's investigation is irrelevant in this proceeding, more properly alleged in a proceeding directly challenging the allegedly nonexistent fraud investigation. Rather, at issue for Respondent's "reliable information" determination is whether a State investigating or prosecutorial agency informed Respondent of its ongoing investigation of a provider for fraud. As it is uncontested, on this record, that Respondent's withhold is based upon such information, Petitioner failed to demonstrate that Respondent's withhold is irrational, arbitrary or capricious.

Accordingly, the Petition is dismissed.

This Decision and Order is being returned to the attorneys for the Respondent. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: November 5, 2010
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated September 2, 2010; Verified Petition, dated September 2, 2010; Affidavit of Constance Laymon, dated September 2, 2010, with attached Exhibits A-C; Affidavit of Hermes Fernandez, dated September 2, 2010, with attached Exhibits A-F.
2. Answer, dated October 13, 2010 with attached Exhibits A-F; Affidavit of Kathleen Watras, dated October 13, 2010.