

**Matter of City of New York v Daines**

2011 NY Slip Op 31464(U)

May 25, 2011

Supreme Court, New York County

Docket Number: 401063/10

Judge: Joan B. Lobis

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

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In the Matter of

THE CITY OF NEW YORK,

Petitioner,

Index No. 401063/10

for a Judgment Under Article 78 of the New York CPLR

**Decision, Order and Judgment**

vs.

RICHARD F. DAINES, as Commissioner of the New  
York State Department of Health, and THE NEW YORK  
STATE DEPARTMENT OF HEALTH,

Respondents.

**UNFILED JUDGMENT**

UNFILED 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)

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JOAN B. LOBIS, J.S.C.:

By its Verified Amended Petition (the "Petition"), the City of New York ("City") brings this special proceeding, under Article 78 of the C.P.L.R., against respondents Richard F. Daines, as Commissioner of the New York State Department of Health, and the New York State Department of Health (collectively "DOH" or the "State"), challenging DOH's audit determination regarding the amount of state aid provided to the City. Petitioner seeks a judgment declaring that DOH's determination that the City was overpaid on its claims for state aid pursuant to Article 6 of the New York Public Health Law for years 2003 and 2004, as contained in DOH's final audit report, was in error, arbitrary and capricious, an abuse of discretion, contrary to law, and had no basis in fact; prohibiting and enjoining DOH from collecting or otherwise obtaining the allegedly overpaid funds; ordering DOH to recalculate the overpayment to the New York City Department of Health and Mental Hygiene ("DOHMH") in a manner that restores the improperly excluded expenditures and applies proper accounting methods; and ordering a transfer of funds once DOH recalculates the

state aid due to petitioner. DOH answers and maintains that its final audit report is supported by a rational basis and was not arbitrary or capricious, an abuse of discretion, or contrary to law. DOH also asserts in its answer that DOHMH does not have the legal capacity to sue DOH. The issue of capacity to sue was addressed in this court's decision and order dated November 5, 2010 (familiarity with which is presumed), by which the court denied DOH's pre-answer motion to dismiss the Petition on the grounds that DOHMH lacks capacity to sue.

As set forth in the Petition, DOHMH administers public health expenditures in New York City and is partially reimbursed for such expenditures through designated federal and state funding sources, including state aid to cities and counties for general public health work ("GPHW") activities pursuant to Article 6 of the New York Public Health Law ("State Aid"). Generally, to be eligible for State Aid, a municipality must submit an application and a Municipal Public Health Services Plan ("MPHSP") to DOH; implement and adhere to the MPHSP, as approved; submit a report of expenditures for the prior fiscal year; employ someone to supervise the services provided; and appropriate the funds to finance public health services. Public Health Law § 600. The municipality must submit the MPHSP every two years.<sup>1</sup> Public Health Law § 602(1). The MPHSP must include information such as estimates of the services needed; statements of objectives; descriptions of the plans for achieving the objectives; a projected budget; descriptions of the services already available; and evidence that the municipality has adopted the plan as the basis for their public health activities. Public Health Law § 602(2). The commissioner of DOH then reviews the MPHSP

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<sup>1</sup> In 2006, Section 602(1) was amended to require that an MPHSP be submitted every four years.

and either approves or disapproves the plan. In approving or disapproving the plan, the commissioner considers to what extent the plan will satisfy the standards and goals of public health services and the extent to which the services will promote public health. Services that promote public health are described as family health services (related to pregnancy and children); disease control; health education and guidance; community health assessment ("CHA") (analysis of the community's vital statistics to detect sources of illness and disease and address other problems adversely affecting public health); and environmental health services. Public Health Law § 602(3)(b). If, upon audit and review, the commissioner finds that expenditures were not made according to the MPHSP, the commissioner may withhold State Aid reimbursement. Public Health Law § 603(2).

The format of the MPHSP includes three parts. Part A is information provided by DOH and requires no responses from the municipality. Part B requires the municipality to describe its activities. For ongoing activities, the municipality must simply name the activity, describe the category that the activity falls under, and set forth the performance measures/standards for the activity. For new activities, the municipality must describe the activity and why it is being undertaken; the category that the activity falls under; and any performance standards/measures/indicators. Part C is a checklist of review criteria arranged in a table format. The checklist elicits "yes or no" responses to specific areas of inquiry. A comments section is provided to elaborate any response to the checklist.

DOH audited the City's State Aid expenditures and revenues for fiscal years 2003 (July 1, 2002 to June 30, 2003) and 2004 (July 1, 2003 to June 30, 2004) (collectively the "Audit

Period"). The audit was conducted to determine whether the City's accounting records documenting its expenditures and revenues supported the amount of State Aid awarded during the Audit Period. All six of the City's submissions to DOH during the Audit Period (CHAs and MPHSPs) had been approved by DOH. Importantly, all of the claims that DOHMH filed for reimbursement during the Audit Period were submitted on the accrual-based (as opposed to the cash-based) system of accounting, and DOH approved those claims based on the accrual basis of accounting.<sup>2</sup>

On January 13, 2009, DOH conducted an exit interview with DOHMH and provided DOHMH with a copy of the draft audit report (the "Draft Report"), in which DOH initially determined that the City had received \$37,521,254 more in State Aid than it was entitled to during the Audit Period. DOHMH provided DOH with a response to the Draft Report on April 16, 2009 (the "Response"), in which DOHMH challenged DOH's disallowance of a number of DOHMH expenditures and DOH's conversion of DOHMH's ledgers from accrual-based accounting to cash-based accounting. DOHMH contended that the Draft Report improperly failed to include all expenditures eligible for reimbursement, thereby understating DOHMH's spending eligible for reimbursement; did not account for liquidations of accruals after the close of fiscal year 2004, thereby understating DOHMH's spending eligible for reimbursement; did not consider eligible expenditures because the expenditures were not documented in the MPHSP, thereby understating DOHMH's spending eligible for reimbursement; and included revenue related to activities not eligible for State Aid, thereby overstating DOHMH's revenues.

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<sup>2</sup> It is undisputed that in the accrual method of accounting, expenditures are recorded for the fiscal year in which they were incurred, regardless of when the payment is actually liquidated, and revenue is recognized as soon as it is owed, regardless of when it is actually realized. In contrast, in the cash method of accounting, expenditures are recorded when they are liquidated and revenue when it is realized; the time when an expenditure is incurred or revenue is earned is irrelevant.

On December 23, 2009, DOH issued a final audit report (the "Final Report") determining that the City had been overpaid by \$22,179,926 in State Aid for GPHW for the Audit Period, and requested payment from the City in that amount. In the Final Report, DOH set forth that it used DOHMH's expenditure and revenue ledgers as the basis of the audit. The auditors determined that the expenditure ledgers supported \$1,293,377,851 in gross expenditures for the Audit Period on the accrual basis of accounting, broken down into \$661,808,833 in gross expenditures for fiscal year 2003 and \$631,569,018 for fiscal year 2004. To convert the expenditures to the cash basis of accounting, the auditors subtracted the year's accounts payable from the gross expenditures for 2003 and 2004, and added the 2003 accounts payable to the gross expenditures for 2004; the subtotal after the auditors' conversion of the expenditures from accrual to cash was \$623,762,395 for 2003 and \$621,773,803 for 2004. The auditors next added DOHMH's "maintenance in lieu of rent" payments to each year's expenditures, bringing the gross adjusted expenditures for 2003 to \$624,768,545 and for 2004 to \$622,888,182. Next, DOH reduced the expenditures by amounts that it determined DOHMH had spent on non-GPHW-related activities and for activities ineligible for GPHW reimbursement.

In the Final Report, DOH determined that DOHMH's revenue ledgers supported \$1,302,381,269 in gross revenues on the accrual basis of accounting. To convert the revenues to cash-based accounting, DOH reduced the revenues by the current year's accounts receivable for fiscal years 2003 and 2004, and increased the revenue by the previous year's accounts receivable for 2004, amounting to \$550,339,985 and \$638,264,890 in gross adjusted revenue for fiscal years 2003 and 2004, respectively. DOH's auditors then adjusted out revenues unrelated to GPHW activities,

bringing the revenues down to \$247,364,846 and \$282,842,971 for fiscal years 2003 and 2004, respectively. DOH took these amounts and calculated a "revenue offset" for revenues attributable to ineligible activities per 10 N.Y.C.R.R. § 40-1.40(e), which further reduced the revenues to \$240,940,702 and \$275,651,970 for fiscal years 2003 and 2004, respectively, for a total GPHW revenue of \$516,592,672 for the Audit Period.

GPHW expenditures, less GPHW revenue, amounted to a net of \$248,182,667 and \$245,125,911 for fiscal years 2003 and 2004, respectively, for a total net reimbursable expenditure amount of \$493,308,578 for the Audit Period. Of this amount, DOH calculated that \$363,827,983 was attributable to core activities and \$129,480,595 was attributable to optional activities for the Audit Period. DOHMH was entitled to base grants in the amount of \$7,207,456 for the Audit Period. The remainder of the core activities after the base grants was \$356,620,527, which are reimbursable at 36%, for a reimbursement amount of \$127,383,389. The optional activities, which are reimbursable at 30%, amounted to \$38,844,179 in reimbursements. Base grants, plus reimbursed core activities, plus reimbursed optional activities equals \$174,435,024; this is the amount DOH determined DOHMH should have been reimbursed for GPHW for the Audit Period. In actuality, DOHMH was reimbursed in the amount of \$196,614,950, resulting in what DOH calculated to be an overpayment of \$22,179,926. On December 23, 2009, DOH asked DOHMH to repay that amount, plus an additional \$3,835,979 in expenses related to the Office of the Chief Medical Examiner ("OCME") that DOHMH conceded it was overpaid during the Audit Period in its Response, for a total repayment of \$26,015,905. DOHMH brought this special proceeding to challenge the requested repayment amount shortly thereafter.

The City alleges that DOH's determination in the Final Report that it had overpaid DOHMH in the amount of \$26,015,905 was contrary to the law, arbitrary and capricious, an abuse of discretion, and without any basis in fact because the figure was determined by improper methodology. Petitioner contends that a proper audit would have revealed that DOHMH was actually underpaid in the amount of \$3,122,262. Petitioner advances two overarching arguments in challenging the audit: (1) DOH erroneously excluded expenditures on eligible program activities; and (2) DOH converted DOHMH's ledgers from cash- to accrual-based accounting using improper methodology. Petitioner relies primarily on two affidavits in support of its arguments. Mario Merlino, Director of Policy and Planning at DOHMH during the Audit Period, sets forth in his affidavit DOHMH's understanding of the requirements of the MPHSP and the CHA and how to apply for State Aid. Assunta Rozza, Deputy Budget Director, and later Budget Director, during the Audit Period, sets forth in her affidavit DOHMH's understanding of the claims process and its criticisms of the Final Report.

In opposition, DOH asserts that the legal and factual basis supporting the Final Report was reasonable and should be upheld. Respondents also rely primarily on two affidavits in support of its position. Marie Miller, DOH's Public Health Law Article 6 Program Director during the Audit Period, sets forth DOH's understanding of the requirements of the MPHSP and the CHA and how to apply for State Aid. David Pisaneschi, Principal Accountant in the Audit Unit and the Audit Manager for the Final Audit, sets forth DOH's position regarding the audit process.

In support of DOHMH's application, Mr. Merlino sets forth that approximately a decade ago, DOH overhauled the State Aid application process and changed its procedure. Mr.

Merlino states that after the overhaul, DOHMH understood that the CHA would serve as the basis for all local public health planning and that the MPHSP procedure would be simplified and the reporting reduced primarily to a checklist format. He sets forth that DOHMH believed the CHA to be a component of the MPHSP and that activities reported through the CHA would be deemed reported in an MPHSP. Mr. Merlino sets forth that only more recently, after the audit process began, did DOHMH find out that activities had to be included in both the CHA and the MPHSP in order to be eligible for State Aid.

In support of DOH's position, Ms. Miller sets forth that the MPHSP's instructions explicitly advise municipalities of the need to provide sufficient or supplemental information about activities, and that the information specifically elicited in the MPHSP is only the minimum amount of information required to be reported. Further, she contends, the MPHSP's instructions provide that a municipality can explain, in a "comments section," why a "yes or no" response to the checklist is not applicable. Ms. Miller sets forth that since the overhaul, DOH has treated the CHA and the MPHSP as two separate documents; the CHA is the statement of the municipality's needs, and the MPHSP is the planning document. Ms. Miller maintains that DOH made the format for the CHA less prescriptive and rigid, but that a description of needs in a CHA is not, alone, sufficient basis for reimbursement. Ms. Miller states that DOH relies on Public Health Law §§ 605(2)(a) and (b) in setting forth that no reimbursement will be provided for services that are not in an approved MPHSP. Ms. Miller further sets forth that DOH relies on 10 N.Y.C.R.R. § 40.1-52 to identify projects that are eligible for reimbursement; that section 40-1.53 identifies projects that are not eligible for reimbursement; that even if an ineligible activity is partially or fully described in an MPHSP, DOH

cannot reimburse that activity; and that up through 2010, municipalities that wanted reimbursement for services other than those explicitly eligible under Part 40 or Article 6 could seek approval of such services and reimbursement for the costs under 10 N.Y.C.R.R. § 40-3.1 (which has since been repealed).

In reply, DOHMH maintains that the CHA is part of the MPHSP; that there is no basis behind DOH's interpretation that the CHA and the MPSHP are separate, discrete documents; and that there is no basis for DOH to retroactively change its interpretation of the MPHSP and CHA.

As pertains to the conversion from accrual-based accounting to cash-based accounting, in support of the petition, Ms. Rozza contends that it was only after DOH commenced the audit that DOHMH was informed by DOH that claims must be submitted on a cash basis. DOHMH then started using the cash method for claims starting with its supplemental claim for fiscal year 2005. Mr. Pisaneschi, in support of DOH's position that it has always required claims submitted as cash-based accountings, maintains that 10 N.Y.C.R.R. § 40-1.17(c), which states that claims must be submitted within two months of when the expense claimed was made, "plainly indicate[s]" that a municipality's claims for State Aid reimbursement must be based on paid expenditures, not anticipated future expenditures. He sets forth that cash-based accounting is based on paid expenditures, so 10 N.Y.C.R.R. § 40-1.17(c) requires municipalities to submit claims on the cash basis. DOH contends that it communicated this requirement to the municipalities as early as 1999, but that DOHMH continued to improperly utilize accrual based accounting to submit its claims.

Ms. Rozza contends that DOH erred in calculating the amounts of GPWH expenditures and GPHW revenues on which to determine the net GPHW expenditures and, thus, the amount of State Aid that DOHMH was entitled to. Ms. Rozza sets forth that DOH failed to explain which ledger items were included in the calculation of expenditures or why DOH's calculation of expenditures differed from that determined by DOHMH in its Response. Mr. Pisaneschi maintains that DOHMH categorized its ledger items under certain subheadings; DOH examined the category delineated as CITY/STATE/GRANT expenditures, and worked from there. Mr. Pisaneschi contends that the expenditure calculations in the Final Report differ from the Response because petitioner's Response included items not eligible for GPHW reimbursement. He sets forth that DOHMH's insistence on recalculating the initial claims was unhelpful because that would have required an entirely new audit, and furthermore, DOHMH failed to explain how it arrived at its calculation as compared to DOH's calculation. Regardless, Mr. Pisaneschi states, the expenditures were taken from DOHMH's ledgers, which cannot be changed.

Ms. Rozza sets forth that to calculate expenditures, DOHMH used the amount of all expenditures on program activities eligible for reimbursement, and that DOH improperly excluded from that calculation expenditures for which DOHMH expected funding from a different source other than the city tax levy ("CTL") or State Aid, thereby distorting cash expenditures downward. Mr. Pisaneschi, in response, sets forth that DOHMH's contention that DOH excluded expenditures for which DOHMH expected funding from a different source other than CTL or State Aid is erroneous. He maintains that the only expenditures excluded were those that were not eligible for reimbursement, and that all eligible expenditures were included even if the revenue was not realized

in the same year. Mr. Pisaneschi concludes that DOHMH's calculations include expenditures not eligible for GPHW State Aid and were not part of its original claims. However, between the Draft Report and the Final Report, Mr. Pisaneschi sets forth that DOH did accept some of DOHMH's additional expenditures related to rabies and arthropod control and physically handicapped children's programming, which were included in the audit calculations under "Additional Expenditures Provided in Response to Draft Audit Report."

In adjusting DOHMH's expenditures from accrual- to cash-based accounting, Ms. Rozza contends that DOH erroneously excluded expenditures liquidated after the Audit Period, between 2004 and 2008. DOHMH contends that these liquidations should be added back into the calculation of expenditures for the Audit Period because in later claims, DOHMH avoided seeking reimbursement for liquidations that it claimed in fiscal years 2003 and 2004 on the accrual basis of accounting. In DOHMH's calculations, the expenditures liquidated between 2004 and 2008 amount to approximately \$33.3 million. Mr. Pisaneschi responds that the liquidations between 2004 and 2008 should not be added back, because that would be inconsistent with cash-based accounting, as expenditures cannot be claimed in they year that they are accrued if payments are made in a later year.

Ms. Rozza next addresses the State Aid adjustments, which served to reduce the expenditures by \$197,019,191 in total. Ms. Rozza contends that DOH erroneously adjusted DOHMH's expenditures under the belief that certain activities were not GPHW-related. The programs at issue are tobacco control; early intervention; arthropod surveillance and control; the

physically handicapped children's program; and expenditures related to OCME. Ms. Rozza contends that tobacco control is a core program that the City disclosed prior to the Audit Period and continuing into the Audit Period, and that expenditures should not have been downward adjusted for tobacco control. As to early intervention, Ms. Rozza sets that it, too, is a core activity that was previously disclosed in prior applications. On the other hand, Ms. Rozza maintains it would have been appropriate for DOH to exclude expenditures related to arthropod surveillance and control, the physically handicapped program, and OCME, and that DOH erred in not excluding such expenditures.

Mr. Pisaneschi maintains that the expenses adjusted as not GPHW-related were reported by DOHMH as such, not by DOH. He contends that DOHMH adjusted its own expenses for tobacco control programs, and that this downward adjustment is proper because tobacco control is ineligible for State Aid due to the Tobacco Master Settlement Agreement (see Article 13-G of the Public Health Law) and DOHMH was not required to report revenue or expenditures related to tobacco control. As to early intervention, Mr. Pisaneschi contends that DOHMH excluded its early intervention expenditures without explanation, but because DOH determined that this downward adjustment in the expenditures was erroneous, it included the City's early intervention expenditures as an auditor's adjustment, and also included the revenue. DOH contends that this action benefitted DOHMH. However, DOH maintains that early intervention is not a core activity. As to the arthropod surveillance and control and the physically handicapped program, DOH maintains that it did identify these costs in its auditor's adjustment, so they were excluded from the net expenditures. As to OCME, DOH contends that DOHMH had already removed OCME expenditures before it gave DOH the ledger expenditures.

Ms. Rozza next addresses DOH auditor's adjustments, which served to reduce the expenditures by \$40,736,282 in total. DOHMH maintains that DOH erroneously excluded what it determined were ineligible ledger expenses. She concedes that six items were properly disallowed as expenditures ineligible for GPHW reimbursement: housing opportunities for people with AIDS (2004); animal affairs, 2003-04; mental health administrative grant, 2003; genetic diseases, 2003; parking permits for the disabled, 2003; and the physically handicapped children's program, 2003. She disputes twelve of the adjustments as improper. Disallowing pest control, day care, and poison control activities due to their alleged omission from an MPHSP is improper, Ms. Rozza contends, because these activities were disclosed in MPHSPs and CHAs prior to and during Audit Period. Mr. Pisaneschi responds that the regulations do allow for arthropod vector control, but that pests that are not arthropods, are not covered in the regulations, and are not eligible for reimbursement. He maintains that DOHMH's pest control activities were not sufficiently described in the MPSHP to allow for adequate review or approval of these activities. As to day care, Mr. Pisaneschi responds that only certain activities related to Child Health Care Consultant activities are eligible; services related to the Office of Children and Family Services are not eligible for reimbursement as a GPHW activity. Further, he maintains, while poison control is not eligible for GPHW reimbursement, per se, the off hours calls relative to rabies incidents are eligible activities. Mr. Pisaneschi sets forth that when DOHMH furnished DOH with the ratio of rabies calls to total calls, the auditors used those numbers to calculate what was eligible and what was ineligible.

Ms. Rozza sets forth that five valid expenditures were improperly disallowed by DOH as allegedly ineligible for State Aid: health care access ("HCA"); World Trade Center ("WTC")

GPHW activities; school-based health centers; asthma initiative; and family violence administrative grant. She contends that these activities were disclosed in filings for the Audit Period and were disclosed in filings prior to the audit period. In opposition, Mr. Pisaneschi sets forth that some HCA expenditures that were eligible were accepted by DOH between the Draft Report and the Final Report, but sets forth that pharmaceuticals for uninsured people, contract costs for providing small business access to health insurance, and managed care costs are not eligible expenses and were properly excluded. As to the WTC GPHW activities, Mr. Pisaneschi contends that what DOHMH disclosed in the MPHSPs was anthrax response and emergency preparedness; these activities did not allude to the WTC response efforts. Accordingly, he states, DOH determined that the WTC activities were not eligible for reimbursement. Additionally, Mr. Pisaneschi sets forth that the City received federal funds for WTC-related activities, so if the revenue for these activities were included in the audit, it would further reduce the net State Aid due to the City. As to the school-based health centers, DOH contends that the City failed to provide documentation that would support these centers for the Audit Period. As to the asthma initiative, Mr. Pisaneschi explains that only \$300,000 out of \$6,000,000 in total asthma expenses was disallowed as an expenditure because that money was related to activities associated with a contract to develop an information system that was not described in the MPSHP. Finally, Mr. Pisaneschi contends that the family violence administrative grant was not disclosed in an MPHSP.

Other activities that DOHMH maintains were improperly excluded as expenditures in the Final Report are early intervention fringe benefits; mental health phone charges; and mental health charges. Ms. Rozza agrees that fringe benefits are ineligible, but contends that DOH

overstated the amount attributable to fringe benefits by \$1,662,385. She contends that the mental health phone charges were never included in any claim that DOHMH made to DOH, and that the mental health charges did not appear in the Draft Report. Mr. Pisaneschi contends that the mental health expenditures were included in the City's ledgers under CITY/STATE/GRANTS, and that the adjustments for mental health charges were included in the Draft Report but were previously incorporated into other categories, and in the Final Report are set forth separately.

Ms. Rozza (DOHMH) further argues that the State improperly made increases to gross expenditures that do not correspond to any actual expenditures, so these increases should be deducted. In opposition, Mr. Pisaneschi contends that these adjustments were properly made because the State included all revenue applicable to GPHW grants in computing the State Aid due to the City, but because grant expenditures were fully reimbursed (including fringe benefits), all grant expenditures were included to fully offset grant revenue.

As to DOH's calculation of revenue in the Final Report, Ms. Rozza maintains that the state erroneously calculated the City's gross revenues. First, she argues, DOH never adequately explained how it arrived at gross revenues. Second, she argues that DOH erroneously adjusted the revenues to reflect revenue on a cash basis, because DOH assumed that the revenues shown were actually realized in the period shown. Further, Mr. Rozza contends, the City does not have a method of recording grant revenue on a cash basis, so it loses its ability to claim State Aid for any difference between the amount spent on activities eligible for State Aid and the amount actually reimbursed by the grantor. In opposition, Mr. Pisaneschi disputes Ms. Rozza's contention that the City does not

have a method of recording grant revenue on a cash basis, contending that DOHMH's Office of Revenue/Finance tracks grant revenues on a cash basis. He sets forth that DOHMH provided DOH with reports of revenues paid for fiscal years 2003 and 2004, and then DOH reconciled these figures with the City's cash receipts records. Mr. Pisaneschi sets forth that DOH was therefore able to identify revenue that accrued in fiscal year 2002 but was actually received in 2003, and revenue that accrued in 2004 but was not received until 2005, so not to double count any revenues.

Ms. Rozza contends that after the City filed its supplemental claim in 2005, it never accounted for revenue previously recognized on the accrual method, so DOH should not have deducted those revenues already recognized. In opposition, Mr. Pisaneschi contends that DOHMH should have filed supplemental claims to remedy this adjustment, but regardless, events in fiscal year 2005 are outside the scope of the audit and are irrelevant.

Finally, Ms. Rozza contends that the State failed to exclude, and therefore reduce revenues, for certain ineligible revenues from the early intervention program, and that DOH failed to adjust revenue for activities related to animal licensing. In opposition, Mr. Pisaneschi maintains that the City was only assessed grant revenues for the early intervention program related to reimbursement of administrative expenditures, and that DOHMH and DOH agreed to include all animal license revenues in the total revenues because the expenditures were included in the total expenditures.

DOHMH argues that DOH committed plain error in disallowing certain program activities—pest control; day care; school-based health centers; asthma initiative; and family violence

administrative grant activities—on the grounds that DOHMH did not document the events in its MPHSP. In most cases, petitioner argues, DOHMH had conducted these activities prior to the Audit Period and disclosed them through MPHSPs and CHAs approved by DOH. Petitioner sets forth that DOH's determination that disclosure through a CHA, alone, is insufficient for eligibility for reimbursement, is incorrect and an erroneous interpretation of the requirements of Article 6. Article 6 requires the CHA as a component of the MPHSP, not a separate document. Petitioner argues that the information that the statute calls for in the MPHSP, such as descriptions of the immediate and long term needs for public health services, is the kind of information that DOH advised local health departments to include in their CHAs. DOHMH argues that since the CHA is the basis for all local health planning, describing program activities in the CHA naturally satisfies the statutory disclosure requirement. Thus, petitioner argues, there is no basis in the law for regarding the CHA as separate, making DOH's reading of its own regulations unreasonable. DOHMH therefore contends that DOH's arbitrary and narrow determination that the MPHSP is separate from the CHA for the purposes of an audit is improper and renders any determination made on this basis defective. Additionally, petitioner argues that DOH had previously instructed the City not to include information in the MPHSP beyond that information that which was explicitly solicited. Accordingly, petitioner maintains, DOHMH understood that a program's inclusion on the CHA satisfied the disclosure requirement. DOHMH contends that DOH's contention that program activities must be described in an MPHSP and not a CHA is in disregard of its own past guidance to DOHMH and therefore constitutes arbitrary and capricious action. DOHMH also argues that, if the CHA is not a component of the MPHSP, then DOH had no authority to reduce the detail of the information solicited in the MPHSP, and furthermore, that DOH is estopped from claiming that the MPHSP

should have been more detailed when it expressly eschewed an extensive, narrative discussion of program activities in reformatting the MPSHP.

DOHMH argues that DOH's determination that certain activities identified in the MPHSP were not eligible for reimbursement because they do not qualify as activities reimbursable by State Aid was irrational and due no deference. DOHMH maintains that Article 6 defines the phrase "promote[s] the public health" expansively and encompasses activities that DOH excluded such as educating residents about public health insurance programs; monitoring Medicaid services; operating a poison control call center that handled health care providers' reporting of disease outbreaks and biological threats; reducing tobacco use through community education efforts; and facilitating therapeutic and support services to eligible children and their families. Petitioner argues that in excluding these activities, even though it had approved them in the State Aid applications, DOH committed legal error.

As to the alleged accounting errors, DOHMH first maintains that DOH relied on an unreliable methodology to convert the City's ledgers from the accrual basis to the cash basis of accounting. Petitioner alleges that DOH's internal inconsistencies, such as excluding activities funded through a source other than the CTL, distorted DOH's calculation of net expenditures to the extent that DOHMH liquidated an expense during one year but did not receive the offsetting revenue until a subsequent period. In order to account for the distortions, DOHMH claims that DOH should have included expenditures on all eligible program activities regardless of the funding source. Further, on the revenue side, petitioner contends that DOH included revenue recognized by DOHMH

for ineligible activities, so if DOH excluded expenditures for ineligible activities, it should have excluded revenues for ineligible activities. These inconsistencies, DOHMH maintains, render the audit erroneous.

Second, DOHMH argues, DOH's conversion of its books to cash-based accounting arbitrarily deprived DOHMH of State Aid to which it was entitled in the year following the Audit Period. After moving to the cash basis in 2005, in order to avoid double claiming, DOHMH sets forth that it avoided including expenses liquidated in subsequent years because they were claimed on the accrual method during the Audit Period. It is petitioner's position that DOH's failure to accommodate this fact produced an arbitrary and capricious inequitable result.

In opposition, DOH maintains that the legal and factual basis supporting the Final Report is reasonable and should not be disturbed. DOH contends that the audit showed that petitioner failed to abide by the plain terms of the governing statute and regulations, even though respondents had previously instructed petitioner to use cash-based accounting methods for its submissions to DOH. DOH maintains that petitioner's failure to use cash-based accounting, despite being on notice of this requirement, cannot be attributed to respondents or a change in policy.

DOH also argues that DOHMH's claims that it should be granted relief based on the doctrine of equitable estoppel is flawed, because DOH's determination was not based on a departure from prior policy, but a straightforward application of the language in the laws and regulations. Further, DOH argues that "estoppel cannot be invoked against a governmental agency to prevent it

from discharging its statutory duties . . . ." New York State Med. Transporters Assoc., Inc. v. Perales, 77 N.Y.2d 126, 130 (1990).

DOH sets forth that petitioner's claim that DOH's interpretation of the laws and regulations that it enforces is due no deference is wrong. Respondents aver that this is not a situation where an agency has interpreted the law in an irrationally narrow way so as to defeat the very purpose of the law. Rather, respondents maintain, DOH undertook an in-depth review of petitioner's plans and submissions and applied the statutes and regulations as written. DOH further maintains that its calculations were carefully and empirically made, and that petitioner has failed to make the required showing otherwise. Respondents argue that the fact that petitioner offers a different interpretation than that adopted by DOH concerning its own regulations is not a sufficient basis for setting aside its determination. DOH contends that the fact that DOHMH may have expended money for public services does not mean New York State is required to reimburse DOHMH in ways that are not provided for in its regulations.

Additionally, DOH argues that its audit findings that a number of activities for which DOHMH sought reimbursement were, in fact, ineligible for reimbursement, were warranted. DOH sets forth that State Aid reimbursement requires a municipality to adequately describe its need for the service in the CHA and adequately describe the program activities that will address the needs in the MPHSP. It is DOH's position that the services approved in the MPHSP must also be eligible for reimbursement under DOH regulations or the municipality must be granted special approval to obtain State Aid for services other than those explicitly deemed eligible under DOH regulations.

DOH maintains that the instructions for the MPHSP allow a municipality to submit any information necessary to support the MPSHP, and that petitioner was aware of those instructions. DOH cites Public Health Law § 603(2) in setting forth that DOH may withhold State Aid for appropriate services if, on audit and review, such services are not furnished or rendered in conformance with the rules and regulations established by the commissioner, or that the expenditures were not made according to an approved MPHSP.

As to the accounting conversion, respondents argue that petitioner's submissions on the accrual basis were improper, such that petitioner received State Aid incorrectly based on expenditures that petitioner had not yet paid and revenues that petitioner had not yet received. Citing its regulations, DOH maintains that in order to receive State Aid, municipalities are required to make submissions using cash-based accounting. Section 40-1.71(c) provides that claims for State Aid must be submitted not later than two months after the calendar quarter in which the expenditures claimed were made. DOH argues that this language requires a municipality's claims to be made on a cash basis, since cash basis accounting is made on actual expenditures. Section 40-140(e) provides that municipalities must attempt to collect payments for services, and shall report collected revenue to the commissioner so that it can be deducted from eligible expenditures claimed to produce a net eligible State Aid base amount. DOH argues that a net base amount can only be determined through cash-based reporting, so a municipality must use cash-based accounting to file claims. Finally, DOH maintains the words "expenditure" and "reimbursement" as set forth in Public Health Law Article 6 can only reasonably be understood in terms of cash-based accounting; expenditure means a disbursement of money, and reimbursement means to repay or make whole. Thus, DOH concludes,

DOHMH could not rationally claim to be ignorant of respondent's requirement that submissions be made on a cash basis. Regardless, DOH claims that it communicated the requirement for cash-based reporting twice in 1994 by way of a "Dear Colleague" letter and a newsletter. Therefore, to correct petitioner's use of accrual-based reporting, DOH's audit findings included accrual-to-cash adjustments.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974); C.P.L.R. § 7803. A determination is considered arbitrary and capricious when it is made "without sound basis in reason or regard to the facts." In re Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009), citing Pell, 34 N.Y.2d at 231. If the agency's determination is rationally supported, the court must sustain the determination "even if the court concludes that it would have reached a different result than the one reached by the agency." Peckham, 12 N.Y.3d at 431 (citation omitted). Further, the court must "defer to an administrative agency's rational interpretation of its own regulations in its area of expertise[.]" Id. (citation omitted). See also In re Feigenbaum v. Silva, 274 A.D.2d 132, 136 (1st Dep't 2000); District Council 37, Am. Fed'n of State, County, & Mun. Employees, AFL-CIO v. City of New York, 22 A.D.3d 279, 283 (1st Dep't 2005). The court's role is not to conduct a de novo review of the facts and circumstances or substitute its own judgment for the administrative agency's judgment. In re Kayfield Constr. Corp. v. Morris, 15 A.D.2d 373, 378 (1st Dep't 1962). Rather, the court looks at the record as a whole to determine whether the agency's determination had a rational basis. In re Nelson v. Roberts, 304 A.D.2d 20, 23 (1st Dept 2003); see also Kayfield Constr. Corp., 15 A.D.2d at 378.

In looking at the Final Report as a whole, it cannot be said that the conversion from accrual- to cash-based accounting suffered from such inconsistent methodology as to render it arbitrary and capricious. DOH did provide a rational basis for its requirement that claims be made in cash-based accounting, citing Section 40-1.71(c), which provides that claims for State Aid must be submitted not later than two months after the calendar quarter in which the expenditures claimed were "made," and section 40-1.40(e), which provides that municipalities must attempt to collect payments for services, and shall report "collected" revenue to the commissioner so that they can be deducted from eligible expenditures claimed to produce a net eligible State Aid base amount. DOH must regard these statutes as controlling in determining State Aid. The most straightforward reading of those statutes is that claims are submitted after expenses are liquidated and revenues are realized, which is consistent with cash reporting. Thus, in conformance with the statutes, DOH has a rational basis for requiring claims to be submitted on the cash basis. Further, as set forth in 10 N.Y.C.R.R. § 40-1.20(b), DOH is charged with establishing a uniform financial reporting system to be used for all State Aid transactions. Requiring claims to be submitted on the cash basis is in line with DOH's obligations under section 40-1.20(b).

DOH has set forth, in detail, the methodology it used to arrive at the Final Report. That included examining the City's ledgers and receipts, isolating the categories of expenditures and revenues that pertained to GPHW, determining which transactions were finalized during the Audit Period (i.e., which expenditures were actually paid, and which revenues were actually received), and arriving at amounts that the City actually spent or received, respectively, during the Audit Period. The inconsistency in the conversion cited by petitioner—that DOH did not take into consideration

the accruals from years surrounding the Audit Period—could have been alleviated by the City filing amended or supplemental cash-based claims. DOHMH was provided with the opportunity to submit amended claims for those periods to offset the discrepancies caused by converting the Audit Period accounting to cash-based, but declined. DOH's explanation that it did not consider accruals from the years surrounding the Audit Period because it wanted to isolate the transactions that actually occurred during the Audit Period is rational in furtherance of its aim to audit transactions from a specific time period.

Petitioner concedes, in its reply memorandum of law, that the cash method of accounting is not a flawed means of accounting and that, on an ongoing basis, "any consequences from using cash rather than accrual accounting will have minimal financial significance." Petitioner does not contend that its own ledgers and receipts inaccurately reflect the expenses actually paid and revenues actually earned during the period. It is not the court's function, on review, to dismantle the audit and start over. The conversion was possibly not the most natural way to conduct the audit, given that DOH had tacitly approved petitioner's use of the accrual-based accounting system over the years by approving DOHMH's claims. However, considering that auditing and reviewing GPHW State Aid claims is within DOH's providence and expertise, and that there was a rational and statutory basis for requiring claims to be submitted on the cash basis, DOH's determination to convert petitioner's books to cash accounting, and its methodology in doing so, shall be given deference.

Further, DOH's determination to exclude expenses not properly described in an MPHSP was not arbitrary and capricious. DOHMH contends that reporting an activity through the

CHA is an alternative means of reporting activities to the MPHSP because the CHA is a component of the MPHSP. However, in the statutory and regulatory descriptions of the CHA, it is clear that the CHA is not a device for reporting activities but an assessment of the needs of the community. Public Health Law § 602(3)(b)(4) sets forth that the CHA is an "an analysis of community vital statistics and mortality and morbidity indices to detect the source of illnesses and diseases," and 10 N.Y.C.R.R. § 40-2.150 sets forth that the CHA requires municipalities to "analyze the health status of residents within their jurisdiction with regard to morbidity, mortality, maternal and child health, and other parameters as reasonable and appropriate."

While it has always been a component of the MPSHP, a plain reading of the aforementioned statute and regulation shows that the CHA is the basis for the planned activities, not the plan itself or the format for reporting activities. DOH's interpretation that the mandatory reporting of activities shall not be deemed sufficient if the activity is only identified as an issue in the CHA, as opposed to being specified as a planned activity in the MPSHP, is not arbitrary and capricious because it is based on the plain definitions of the CHA. The fact that, over time, the CHA has evolved to become a document separately submitted from the MPHSP does not change the fact that the CHA is not an activity reporting mechanism; rather, it is the part of the MPHSP which sets forth the needs of the community through data analysis. DOH has an interest in decoupling the CHA from the rest of the MPHSP because keeping the documents separate facilitates frequent amendments to the CHA as time progresses and activities in the MPHSP are successful or not. DOH is charged with implementing the requirements for applications and claims for State Aid, and in that capacity, DOH is empowered to determine how municipalities shall apply for and submit claims for

State Aid. The bifurcation of the CHA from the MPHSP is well within DOH's purview in implementing the statutes and regulations regarding State Aid and is a rational exercise of those powers, given DOH's ongoing need to be apprised of a municipality's status in order to properly consider their applications for State Aid; process claims for reimbursement; and certify that limited State funds are being validly and efficiently allocated.

DOH's determination that certain activities that were either insufficiently described on the MPHSPs in question or were sufficiently described but are ineligible for reimbursement must be excluded from the total expenditures is rational and in conformance with DOH's duty to implement the statutes and regulations related to State Aid. DOH has an interest in municipalities accurately reporting their GPHW activities because it must oversee the reimbursement of those activities, and its determinations that claims should not have been reimbursed for insufficiently described activities or activities that were never eligible in the first place are within its discretion in carrying out the mandates of Article 6 and are entitled to deference. "Moreover, there is a strong public policy to recover public funds improperly received." In re Board of Educ. v. State Educ. Dep't, 135 A.D.2d 903, 905 (3d Dep't 1998), citing In re Westledge Nursing Home v. Axelrod, 68 N.Y.2d 862, 864 (1986).

In its overall approach to the Final Report, DOH's actions were not arbitrary and capricious, were supported by a rational basis, and were not the product of an abuse of discretion or a clearly erroneous interpretation of the law. Again, "in reviewing administrative determinations, a court may not overturn an agency's decision merely because it would have reached a contrary

conclusion." In re Sullivan County Harness Racing Ass'n v. Glasser, 30 N.Y.2d 269, 278 (1972) (citation omitted). This court cannot substitute its judgment for that of DOH. When viewing the record as a whole, it cannot be said that DOH's determination that DOHMH had been reimbursed in an amount greater than permissible, according the statute and regulations regarding State Aid, was irrational. The record reflects that DOH gave DOHMH an opportunity to challenge the findings in the Draft Report and incorporated the changes from the Response that DOHMH demonstrated were warranted in the Final Report. DOH's determination shall not be disturbed.

Accordingly, it is hereby

ORDERED and ADJUDGED that the Petition is denied in its entirety (including petitioner's claim that DOHMH is actually owed \$3,122,262 in State Aid) and the proceeding is dismissed.

Dated: May 25, 2011

  
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JOAN B. LOBIS, J.S.C.

**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).