Personal-Touch Home Care of N.Y., Inc. v City of New York Human Resources Admin.
2019 NY Slip Op 31094(U)
April 16, 2019
Supreme Court, New York County
Docket Number: 154284/2018
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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PERSONAL-TOUCH HOME CARE OF N. Y., INC. f/k/a PERSONAL-TOUCH HOME CARE, INC. a/k/a PERSONAL TOUCH HOME CARE, INC.,

Petitioner,

- against -

CITY OF NEW YORK HUMAN RESOURCES ADMINISTRATION and CITY OF NEW YORK OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS CONTRACT DISPUTE RESOLUTION BOARD,

Respondents.

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Index No. 154284/2018

DECISION and ORDER

Motion Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

Petitioner Personal-Touch Home Care of N. Y., Inc. f/k/a Personal-Touch Home Care, Inc. a/k/a Personal Touch Home Care, Inc. ("Petitioner") brings this action, pursuant to Article 78 of the New York Civil Practice Laws and Rules ("Article 78"), seeking to annul a Memorandum Decision (OATH Index No. 1828/17) dated January 10, 2018 issued by Respondent City of New York Office of Administrative Trials and Hearings Contract Dispute Resolution Board ("CDRB") in the proceeding entitled *Personal Touch Home Care, Inc. v. Human Resources Administration* (the "Decision") pursuant to CPLR § 7803(c). Respondents City of New York Human Resources Administration ("HRA") and CDRB (collectively, "Respondents") oppose.

Background/Factual Allegations

Petitioner has two contracts with HRA to provide home care services to persons eligible for Medicaid who reside in Brooklyn and the Bronx.

By way of background, during the 2013 calendar year, HRA conducted its audit of Petitioner's expenditures for the fiscal year from July 1, 2006 to June 30,

2007. On December 6, 2013, HRA issued a closeout memorandum to Petitioner indicating that Petitioner owed $387,062.90 and $1,218,586.20 in unspent funds relating to its Bronx and Brooklyn home care services, respectively. The closeout memorandum explained how the amounts were calculated and that Petitioner had fourteen days to return the unspent funds.

In 2015, HRA contacted the New York State Department of Health ("DOH") for guidance on the allowability of assessments. On February 18, 2015, DOH issued a letter from General Counsel James Dering ("Dering Letter") stating that in DOH's opinion, assessments paid to the Workers' Compensation Board of the State of New York ("WCB") were not allowable expenses pursuant to the Contract between Petitioner and HRA (the "Contract"). On October 16, 2015, HRA issued a decision denying Petitioner's appeal regarding the allowability of the assessments based on DOH's opinion.

On November 12, 2015, Petitioner submitted a Notice of Dispute in response to HRA's October 16, 2015[1] determination. Petitioner challenged HRA's request to be paid $1,605,649.10 for the Bronx and Brooklyn home care services and requested that workers' compensation expenses incurred by Petitioner be deemed allowable expenses of its program and that Petitioner be permitted to retain and apply funds for write off of bad debt consistent with past practices of the Home Care Services Program.

On September 9, 2016, HRA issued its Agency Head Determination. HRA first found Petitioner's Notice of Dispute to be untimely, holding that Petitioner's receipt of the 2013 closeout memorandum was the "actual determination" that triggered Petitioner's obligation to file the dispute. Notwithstanding this finding, HRA addressed the arguments that Petitioner had made in its November 12, 2015 submission and denied the merits of the claims. HRA concluded that Petitioner was required to return the unspent monies to HRA.

On October 16, 2016, Petitioner filed a Notice of Claim with the Office of the Comptroller of the City of New York in connection with its dispute with HRA. On February 3, 2017, the Comptroller denied Petitioner's Notice of Claim as time barred. On March 3, 2017, Petitioner appealed the Comptroller's decision to the CDRB.

[1] Petitioner's papers use incorrect dates. The Court referenced the Exhibits provided by the parties to determine the correct dates.

On January 10, 2018, the CDRB issued its decision, which determined that the Petitioner's Notice of Dispute filed on November 12, 2015 was untimely because it was filed more than 30 days after HRA's October 16, 2015 Appeal Determination.

Parties' Contentions

Petitioner contends that CDRB's decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion". Petitioner argues that CDRB misapplied Section 4-09(d)(1) of the Procurement Policy Board Rules ("PPB Rules") determining that a non-final closeout memorandum and analysis that was "vague and ambiguous" was a determination and triggering the 30 days period for Petitioner to file a Notice of Dispute. Petitioner argues that CDRB ignored prior precedent. Petitioner cites Ba*rele, Inc. v. Contract Dispute Resolution Bd. Of the City of New York,* 45 Misc. 3d 1215 (A) (Sup. Ct. NY Co. 2014), where the Supreme Court held that CDRB's determination that the Petitioner had only 90 days to file its Notice of Dispute claim, was arbitrary and an error of law.

Petitioner argues that its Notice of Dispute was timely filed. Petitioner contends that 9 RCNY § 4-09(d)(1) requires a Notice of Dispute be submitted to the agency head "within thirty days of receiving written notice of the determination or action that is the subject of the dispute." Petitioner argues that the December 6, 2013 closeout memorandum is ambiguous and does not create a determination, and therefore it does not trigger the thirty-day deadline. Petitioner contends that the October 16, 2015 Appeal Determination was clear and unambiguous and made a determination on the issues raised by Petitioner. Petitioner asserts that the Notice of Dispute submitted on November 12, 2015 was within the thirty-day deadline from the October 16, 2015 Appeal Determination. Petitioner argues that the December 6, 2013 closeout memorandum did not address all of the issues raised by Petitioner and fails to "fully advise Petitioner of the obligation to follow the dispute resolution procedures in the contract and the PPB Rules".

Furthermore, Petitioner argues that HRA has taken the position previously that a closeout memorandum "virtually identical" to the December 6, 2013 closeout memorandum was not a determination. Petitioner argues that after the December 6, 2013 closeout memorandum, Petitioner and HRA sent various correspondences back and forth making it clear that the issues were still under review and the determination was not final.

In opposition, Respondents argue that Petitioner has not met its burden of showing that CDRB's decision was in violation of lawful procedure, was affected by law, or was arbitrary and capricious pursuant to 9 RCNY § 4-09(g)(6) and Section 8.15.G.(6) of the Contract. Respondents contend that the Court's scope of review is narrow when reviewing administrative action and is limited to whether there was a rational basis for the challenged action. Respondents contend that CDRB had a rational basis for determining that the December 6, 2013 closeout memorandum was clear and unambiguous. Respondents argue the discussions between Petitioner and HRA did not toll Petitioner's time to submit a Notice of Dispute. Moreover, Respondents argue that the Dering Letter did not change HRA's original position that the December 6, 2013 closeout memorandum was final.

Legal Standards

"Article 78 proceedings exist for the relief of parties personally aggrieved by governmental action." *Dunne v Harnett*, 399 NYS 2d 562, 563 [Sup Ct, NY County 1977]. Judicial review is limited to questions expressly identified by CPLR 7803. *Featherstone v Franco*, 95 NY2d 550, 554 [2000]. One such question is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." *See* CPLR 7803 [3]. "[I]t is settled that in a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious." *Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363 [1987]. "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." *Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010].

"A challenged determination is final and binding when it 'has its impact' upon the petitioner who is thereby aggrieved". *Edmead v. McGuire*, 67 N.Y.2d 714, 716 [1986] (citation omitted). "The limitations period does not commence to run where the agency has created the impression that the determination, albeit issued, was intended to be nonconclusive." *Id.* (citations omitted). "However, where the determination is unambiguous and its effect certain, the statutory period commences as soon as the aggrieved party is notified." *Id.*

Discussion

CRDB's determination that the December 6, 2013 closeout memorandum was the "controlling determination" is not rational in light of the October 16, 2015 email from HRA to Petitioner. The December 6, 2013 closeout memorandum did not address the allowability of assessment payments which was raised by Petitioner. Furthermore, correspondences between Petitioner and HRA made it clear that the issue raised by Petitioner was still under review. However, the October 16, 2015 email was clear and unambiguous and made a final determination on the allowability of assessment payments and denied Petitioner's "appeal". Therefore, the thirty-day deadline began to run on October 16, 2015. Whether Petitioner timely sent the Notice of Dispute to HRA was not considered and should be remanded back to CDRB.

Wherefore, it is hereby

ORDERED that Petitioner Personal-Touch Home Care of N. Y., Inc. f/k/a Personal-Touch Home Care, Inc. a/k/a Personal Touch Home Care, Inc.'s motion seeking to annul a Memorandum Decision (OATH Index No. 1828/17) dated January 10, 2018 issued by Respondent City of New York Office of Administrative Trials and Hearings Contract Dispute Resolution Board in the proceeding entitled *Personal Touch Home Care, Inc. v. Human Resources Administration* is granted; and it is further

ORDERED that the issue of whether Petitioner Personal-Touch Home Care of N. Y., Inc. f/k/a Personal-Touch Home Care, Inc. a/k/a Personal Touch Home Care, Inc.'s Notice of Dispute was timely is remanded to Respondent City of New York Office of Administrative Trials and Hearings Contract Dispute Resolution Board.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: April 16, 2019

Eileen A. Rakower, J.S.C.