

***Premier Home Health Care Services, Inc. v. Human Resources Admin.***

OATH Index No. 2514/11, mem. dec. (Oct. 17, 2011)

Petitioner sought review of the Administration's audit which required petitioner to repay Medicaid funds. Petition dismissed as untimely.

---

**NEW YORK CITY OFFICE OF  
ADMINISTRATIVE TRIALS AND HEARINGS**

**CONTRACT DISPUTE RESOLUTION BOARD**

*In the Matter of*

**PREMIER HOME HEALTH CARE SERVICES, INC.**

**D/B/A FIRST AIDE HOME CARE**

*Petitioner*

*- against -*

**HUMAN RESOURCES ADMINISTRATION**

*Respondent*

---

**MEMORANDUM DECISION**

**KARA J. MILLER**, *Administrative Law Judge/Chair*

**KEVIN HANRATTY**, *Deputy General Counsel, Mayor's Office of Contracts*

**DONNA R. MERRIS**, *Prequalified Panel Member*

Presently pending before the Contract Dispute Resolution Board ("CDRB" or "the Board") is the petition of Premier Home Health Care, Inc. ("petitioner"). Petitioner is seeking the annulment of an Appeal Determination Letter issued by the Human Resources Administration ("Administration" or "respondent") which required petitioner to return unspent Medicaid funds to the Administration. Petitioner also seeks an annulment of the Comptroller's Determination insofar as it held that portions of petitioner's claim were untimely.<sup>1</sup>

---

<sup>1</sup> It should be noted that the Board's purview does not encompass review of the findings made by the Comptroller, only the agency head. 9 RCNY § 4-09(g); *Pile Foundation Construction Co. v. Dep't of Environmental Protection*, OATH Index No. 1785/09, mem. dec. at 7 (Apr. 15, 2009), *aff'd*, 2010 NY Slip Op 31067(U) (Sup. Ct. N.Y. Co. 2010); *A.J. Pegno Construction Corp. /Tully Construction Co., Inc. v. Dep't of Environmental Protection*, OATH Index No. 1436/08, mem. dec. at 3 (May 21, 2008).

For the reasons set forth below, the Board finds that petitioner's claim is time barred and is therefore dismissed.

### **BACKGROUND**

This dispute arises out of a contract dated November 1, 2001, between Premier Home Health Care, Inc. and the Administration for the provision of home attendant services, funded by Medicaid (Resp. Ex. A). On October 20, 2008, after conducting an audit of fiscal years 2003 and 2004, the Administration issued a Close Out and Recovery Analysis which concluded that petitioner must repay to the Administration certain Medicaid reimbursement payments, in the amount of \$951,681 (Pet. Ex. 6).

On November 12, 2008, petitioner submitted an appeal of the audit to the Director of the Home Services Program (Pet. Ex. 6). The Administration denied petitioner's appeal on March 24, 2009, in an Appeal Determination Letter (Pet. Ex. 1). On April 24, 2009, petitioner submitted a Notice of Dispute to the Commissioner (Pet. Ex. 2). In its Notice of Dispute, petitioner asserted that the dispute was not governed by the ADR provisions in the contract and requested that the timeframe for filing under the contract be tolled until it received a determination from the New York County Supreme Court. The Commissioner did not reply to this request. Petitioner filed an Article 78 with the Court on July 17, 2009. The New York County Supreme Court dismissed the case on April 2, 2010, finding the dispute was governed by the ADR provisions in the contract and therefore petitioner failed to exhaust its administrative remedies. *Barele, Inc. v. NYC Human Resources Admin.*, 2010 NY Slip Op 30760U (Sup. Ct. N.Y. Co. Apr. 2, 2010). Thereafter, on July 9, 2010, petitioner submitted a Notice of Claim to the Comptroller which the Comptroller denied on November 30, 2010 (Pet. Ex. 3).

### **DISCUSSION**

Under the Procurement Policy Board Rules ("PPB Rules"), which were specifically incorporated into the Contract (Contract Part II, Art. 8.15), certain disputes between the City and a vendor "that arise under, or by virtue of, a contract between them" are subject to alternative dispute resolution, a process which begins with the presentation of the dispute to the Agency Head and ends with a presentation to the CDRB. 9 RCNY § 4-09(a) (Lexis 2010). The rules give timeframes for contractors to make submissions at each stage: submissions to the Agency Head must be made "within thirty days of receiving written notice of the determination or action

that is the subject of the dispute,” 9 RCNY § 4-09(d)(1); submissions to the Comptroller shall be made “within thirty days of receipt of a decision by the Agency Head,” 9 RCNY § 4-09(e)(1); and submissions to the Board must be made thirty days after the Comptroller has issued its determination, 9 RCNY § 4-09(g).

The rules also give timeframes in which the decisions at each stage must be issued. The Agency Head must issue its decision “within thirty days of receipt of all materials and information, or such longer time as may be agreed to by the parties,” 9 RCNY § 4-09(d)(3), and the Comptroller has a maximum of ninety days after receipt of all materials to compromise or adjust a claim, 9 RCNY § 4-09(e)(4). Under the rules, “Failure to make such determination within the time required by this section shall be deemed a non-determination without prejudice that will allow application to the next level.” 9 RCNY § 4-09(b). In *Barele, Inc. v. Human Resources Administration*, OATH Index No. 1470/11, mem. dec. (May 16, 2011), where the Agency Head failed to issue a decision, the Board interpreted PPB Rule 4-09(b) to find the petition was time barred as petitioner waited approximately 14 months after its submission to the Agency Head to submit its Notice of Claim to the Comptroller.

Respondent, incorporating its arguments from *Barele*, OATH 1470/11, argues that the petition should be dismissed as petitioner filed its claim with the Comptroller well over a year after the Notice of Dispute was filed. Respondent contends that under the PPB rules, the Commissioner’s failure to issue a decision should have been deemed a non-determination, requiring petitioner to timely file its dispute with the Comptroller. The Agency Head did not consent to tolling the time period in which petitioner should file and therefore, respondent asserts, there was no basis for petitioner to wait for the Supreme Court’s decision before filing its dispute with the Comptroller. Moreover, there is nothing to distinguish this case from *Barele*, OATH 1470/11, which shared the same timelines as the submissions in this case.

In response, petitioner contends that *Barele* was wrongly decided; its interpretation of the non-determination provision in PPB Rule 4-09(b) is erroneous and works to deprive petitioner of its due process rights. Petitioner argues that PPB Rule 4-09(d)(3) does not set a definite timeframe for the Commissioner to act. In support, petitioner points to PPB Rule 4-09(d)(1) which states that after the vendor’s submission, the agency is required to provide all materials relevant to the dispute and following those submissions, either party may demand production from the other, and PPB Rule 4-09(d)(2) which permits the Agency Head to convene an informal

conference, seek outside expertise, and require any such additional material from either as he or she deems fit. In contrast to the rule regarding the Comptroller's investigation, 9 RCNY § 4-09(e)(3), these rules do not specify a timeframe for the Agency Head to complete its investigation. Accordingly, petitioner asserts, a vendor may not know when the Agency Head has received all the materials and therefore has no way to calculate when the Agency Head's failure to issue a decision will be deemed a non-determination. Citing *Castaways Motel v. Schuyler*, 24 N.Y.2d 120, 126-27 (1969), and *Mundy v. Nassau County Civil Service Commission*, 44 N.Y.2d 352, 358 (1978), petitioner maintains that due process requires the ambiguity in the timeframe to be resolved in its favor so that it is not denied its day in court.

Additionally, petitioner avers that allowing this case to proceed on its merits is consistent with the PPB rules. Citing *Dynamic Painting Corp. v. Department of Transportation*, OATH Index No. 901/04, mem. dec. (May 21, 2004), it argues that the timeframes are meant to prevent stagnation of the dispute and to preserve the integrity of the evidence. Because petitioner promptly notified the Commissioner of its claim and its intention to initiate an Article 78 proceeding, petitioner asserts that neither of these concerns is present. Moreover, where petitioner believed its dispute to be outside the scope of its contract, the Article 78 proceeding constitutes good cause for its alleged failure to comply with the PPB timeframes.

Petitioner further reasserts the arguments regarding timeliness raised in its petition; that the timeframe following receipt of a decision is imperative while the timeframe following non-determination is permissive. In support of this argument, petitioner contrasts the language in PPB Rule 4-09(e)(i) ("within thirty days of receipt of a decision by the Agency Head, the vendor shall submit [the Notice of Claim]") with that in PPB Rule 4-09(b) ("[failure to issue a decision] shall be deemed a non-determination without prejudice that will allow application to the next level"). Noting the definition of "shall" in PPB Rule 1-01 ("Shall. Denotes the imperative"), and argues that by stating a non-determination *will allow* application to the next level, as opposed to the vendor *shall* make an application to the next level, the rules do not require petitioner to follow a timeframe where no Agency Head decision has been issued.

Petitioner's arguments are unpersuasive. The same argument regarding the use of the word "shall" in the PPB Rules was rejected by this Board in *Barele*, OATH 1470/11. In that case, the Board explained:

With respect to the use of the word “shall,” petitioner ignores the fact that it is in PPB Rule 4-09(b), which states “[failure to issue a decision] *shall* be deemed a non-determination” (emphasis added). Thus, petitioner is not free to interpret the agency head’s failure to issue a decision as an indefinite toll of petitioner’s time to submit its Notice of Claim to the Comptroller. The statement that the non-determination “will allow application to the next level” merely means that petitioner is not required to appeal; it may abandon its claim at any time. In contrast, when a petitioner seeks to appeal to the CDRB, the petitioner must have first presented its claim to the Comptroller, hence the use of “shall” in PPB Rule 4-09(e)(1).

*Barele*, OATH 1470/11 at 4. Petitioner has presented no reason for a different conclusion in this case.

We are also not persuaded by petitioner’s argument that the PPB rules are ambiguous and accordingly should be construed against respondent as the drafter. The cases petitioner cited in support of this argument, *Castaways Motel v. Schuyler*, 24 N.Y.2d 120, 126-27 (1969), and *Mundy v. Nassau County Civil Service Commission*, 44 N.Y.2d 352, 358 (1978), are distinguishable. In *Castaways Motel*, the Office of General Services created ambiguity regarding the start of the statute of limitations by issuing multiple letters to Castaway Motels: one stating that the New York State Power Authority had requested a covenant of release and a later letter stating that the grant sought was conditioned upon Castaways’ acceptance of the covenant. 24 N.Y.2d at 123-24. The Court of Appeals found that it was ambiguous whether the first letter actually required Castaways to sign the covenant, thus the statute of limitations for Castaways to object to the condition did not begin to run until it received the second letter. *Id.* at 126. Likewise in *Mundy*, the Nassau County Civil Service Commission created ambiguity by issuing eligibility lists and exam grades, and a few days later notifying all eligibles that certification of names from the list would be withdrawn and held in abeyance. 44 N.Y.2d at 356-57. The list was later re-certified. The Court of Appeals found that the Commission created ambiguity as to whether the list was final, and accordingly the statute of limitations for objecting to the exam did not begin to run until the list was re-certified. *Id.* at 358. In both cases, it was the affirmative actions of the agencies that created the ambiguity, not the language of a controlling statute or regulation. Moreover, in both cases, the ambiguity concerned a choice between multiple dates which could start the statute of limitations, not a choice between a date certain and no date at all.

In this case, petitioner attributes the alleged ambiguity to the language of the governing rule, not to respondent’s actions. Indeed, the PPB Rules were not drafted by respondent or even

included in the contract at its behest; rather the rules were created by the Policy Procurement Board under the authority vested in it by section 311 of the City Charter, and are required to be inserted into all City contracts. *See* 9 RCNY § 4-09(a) (Lexis 2011). Where a provision is statutorily required to be inserted into a contract, the rule about construing a provision against the contact's drafter does not apply. *See Hudson Cush-N-Foam Corp. v. Manufacturers Mutual Fire Insurance Co.*, 1969 U.S. Dist. LEXIS 9817 (S.D.N.Y. Nov. 25, 1969); *Greenhaus v. American Progressive Health Insurance Co.*, 33 Misc. 2d 280, 282 (Sup. Ct. Nassau Co. 1962), *aff'd*, 18 A.D.2d 1076 (2d Dep't 1963); *Matarese v. N.H. Municipal Ass'n Property-Liability Insurance Trust, Inc.*, 791 A.2d 175, 179 (N.H. 2002); *Paul Revere Life Insurance Co. v. Haas*, 644 A.2d 1098, 1103 (N.J. 1994). In such cases, the ambiguity can be resolved by looking to case law interpreting said statute or regulation. *See Burke v. First UNUM Life Insurance Co.*, 975 F. Supp. 310, 315 (S.D.N.Y. 1997) (looking to precedent to determine how ambiguous, statutorily mandated contract provision should be interpreted).

The regulatory ambiguity at issue in this case, the commencement of the time period for filing with the Comptroller when the Agency Head has not issued a determination, has been interpreted multiple times by this Board in written, published decisions. *See, e.g., Maracap Construction Industries, Inc. v. Dep't of Transportation*, OATH Index No. 711/08, mem. dec. at 5 (May 9, 2008) (finding the Agency Head's inaction should have been deemed a rejection of petitioner's claim, triggering the timeline for filing its claim with the Comptroller); *Prime Construction Force v. Dep't of Parks & Recreation*, OATH Index No. 942/06, mem. dec. at 5 (Apr. 4, 2006) (finding petition time-barred where Commissioner did not issue an opinion and petitioner failed to file a Notice of Dispute with the Comptroller within 30 days of the Commissioner's non-determination); *Demo-Tech Corp. v. Dep't of Housing Preservation & Development*, OATH Index No. 659/03, mem. dec. at 5-6 (Nov. 25, 2002) (finding where no response was issued by the Agency Head, petitioner should have deemed the inaction a denial of its claim and filed with the Comptroller 30 days thereafter, its failure to do so rendered the petition time-barred); *see also JCH Delta Contracting, Inc. v. City of New York*, 44 A.D.3d 403, 404 (1st Dep't 2007) ("The lack of an adverse determination by the responsible agency on plaintiff's claims did not preclude plaintiff from seeking administrative review in a timely manner since the contract provided that the agency's failure to render a decision within 20 days of the filing of the claim was deemed a rejection of the claim"). Indeed, petitioner's claimed

confusion regarding when the Agency Head is required to act appears disingenuous as in the Article 78 proceeding it represented to the State Supreme Court that the Agency Head was required to render a determination within 30 days after receipt of the Notice of Dispute. *Barele*, 2010 NY Slip Op 30760U at \*17.

Additionally, unlike *Castaways Motels* and *Mundy*, here, petitioner's reading of the statute would render no timeline for petitioner to file. Such an interpretation is unreasonable. As the Court of Appeals has noted, prompt resolution of Medicaid reimbursement disputes "is consonant with sound public policy." *Solnick v. Whalen*, 49 N.Y.2d 224, 232-33 (1980). Consistent therewith, "the PPB rules provide short time frames for utilization of the contract's dispute resolution procedures, evincing an intent to provide a mechanism to promptly resolve disputes". *D. Gangi Contracting Corp. v. Dep't of Parks & Recreation*, OATH Index No. 1642/03, mem. dec. at 5 (Nov. 13, 2003). Clearly an interpretation of the PPB Rules which would provide an indefinite timeframe for the petitioner to file would be contrary to the regulatory intent, and we decline to adopt such an interpretation. *See GML, Inc. v. Cinque & Cinque, P.C.*, 9 N.Y.3d 949, 951 (2007) (construing CPLR 202 as imposing a statute of limitation because an interpretation to the contrary "would cause the statute of limitations to be tolled indefinitely" and the Court did "not believe that the Legislature intended this result in enacting CPLR 202."); *In re Francis S.*, 206 A.D.2d 4, 47 (1st Dep't 1994) (in support of its reading of CPL 330.20(14), stating "[t]o read the statute differently . . . [would result in] a kind of tolling of the limitations period indefinitely suspending the applicant's obligation to move the recommitment process forward to a hearing and determination" which would be contrary to the Legislature's intent).

Nor did we find convincing petitioner's argument that its Article 78 proceeding constituted good cause for its delay in filing with the Comptroller. Though petitioner requested that the Commissioner toll the ADR process during its Article 78 proceeding, that request was never granted. Notably, petitioner argued in the Article 78 proceeding that there was no excuse for the Commissioner not to proceed with the ADR process. *Barele*, 2010 NY Slip Op 30760U at \*12. Such an argument is tantamount to an admission that despite the Article 78 proceeding, the ADR process should have continued according to the timeframes in the PPB Rules. This Board has previously found intervening lawsuits insufficient to justify missing the PPB deadlines. *See, e.g., CAB Assoc., Inc. v. Dep't of Transportation*, OATH Index No. 1728/05,

mem. dec. at 5-6 (Mar. 6, 2007) (finding petition time-barred as it was not presented to the CDRB within timeframe specified by PPB Rules, despite the fact that petitioner filed a lawsuit in the County Supreme Court to dispute the Comptroller's determination); *D. Gangi Contracting Corp. v. Dep't of Parks & Recreation*, OATH Index No. 1642/03, mem. dec. at 6 (Nov. 13, 2003) (finding it was clearly "not the intent of the contract or the PPB rules" to extend the limitations period until the end of related litigation). Petitioner has not presented adequate justification for us to diverge from our precedent.

**CONCLUSION**

Accordingly, the petition is dismissed.

**ALL CONCUR.**

KARA J. MILLER  
Administrative Law Judge/Chair

October 17, 2011

APPEARANCES:

**WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP**

*Attorneys for Petitioner*

**BY: LAURIE T. COHEN, ESQ.**

**MICHAEL A. CARDOZO, ESQ.**

NYC Corporation Counsel

*Attorneys for Respondent*

**BY: GARY ROSENTHAL, ESQ.**