To Be Argued By:
THOMAS J. FLEMING
Time Requested: 15 Minutes

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Court of Appeals

STATE OF NEW YORK

In the Matter of the Application of

PEOPLE CARE INCORPORATED d/b/a ASSISTED CARE,

Petitioner-Respondent,

—against—

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-Appellants.

BRIEF FOR PETITIONER-RESPONDENT

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March 6, 2020

DISCLOSURE STATEMENT

Pursuant to 22 NYCRR 500.1(f), People Care Incorporated hereby discloses that its parent companies are People Care Holdings, Inc. and PCHI Holdings, Inc. People Care Incorporated has no subsidiaries or affiliates.

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Petitioner-Respondent People Care Incorporated, d/b/a Assisted Care ("People Care" or "Petitioner"), by its attorneys, Olshan Frome Wolosky LLP, and Todd V. Lamb, Esq., respectfully submits this brief in response to the Brief for Respondents-Appellants the City of New York Human Resources Administration, Department of Social Services ("HRA") and its Commissioner (together, "Appellants" or "Respondents-Appellants") dated December 6, 2019 ("Br."), appealing decision of Supreme Court of the Appellate Division, First Department, dated July 23, 2019, affirming the Decision and Order of the Supreme Court, New York County (Rakower, J.), dated February 5, 2018 (the "Decision") (A. 10-28), which granted Petitioner-Respondent's Verified Petition under Article 78, C.P.L.R.

Preliminary Statement

In 2003 and 2004, Respondent People Care received grants through a new program established under the Health Care Reform Act of 2000 ("HCRA") and funded through New York's share of recoveries in the tobacco litigation. The HCRA grants were distributed by the Department of Health ("DOH") which "computed and distributed" the funds "in accordance with memorandums of understanding to be entered into between the state of New York and … local social service districts." PHL § 2807-v(1)(bb). Recipients, like People Care, were required to use the HCRA grants for "the purpose of supporting the recruitment and retention of personal care service workers … with direct patient care responsibility...." *Id.*

The core issue on this appeal is whether HRA has regulatory or contractual authority to audit and recoup the HCRA grants issued to People Care under the program established by Public Health Law § 2807-v(1)(bb). According to HRA, the statute and regulations contain an implied mandate for its exercise of such authority, on the basis that the HCRA funds were distributed with Medicaid payments over which HRA indeed has jurisdiction. As all Appellate Division Justices who reviewed the HCRA statute and state regulations concluded, HRA has no such authority. The HCRA statute, the regulations for audit and recoupment of Medicaid funds, and HRA's memorandum of understanding with the DOH, all make clear that authority to audit and recoup HCRA funds belongs exclusively to the DOH.

Appellant HRA's alternative theory is that its pre-existing Medicaid contracts with People Care authorized HRA to audit and recoup HCRA grants. But as the Appellate Division, First Department concluded, the contracts provide for modification in the event that DOH's "method of reimbursing" People Care is changed. Here, the HCRA grants were issued as a modification to the pre-existing contracts. By their express terms, the contracts must be conformed to the new reimbursement method, with DOH having authority over HCRA grants and HRA over general Medicaid funding.

HRA's on again, off again pursuit of People Care, all conducted without any review of its actual expenditure of HCRA funds, speaks volumes in support of the

lower court's rationale in finding against HRA. According to an HRA determination issued in late 2008, the HCRA grants received by People Care in 2003 and 2004 should have been delivered to HRA as "unspent" during the years subject to audit —even though People Care had indeed spent the funds properly, albeit in years after the audit. By treating HCRA funds as indistinguishable from Medicaid funds, HRA limited its review to events arising in a specific fiscal year. While HRA's audit approach may be appropriate for Medicaid funds, which contemplate immediate use on an annual cycle, it makes no sense for HCRA grants, which contain no such requirement. HRA compounded this error by applying standards adopted long after the fact. HRA advised People Care of its position in 2008 and then faulted People Care for not having spent the funds in the year of their grant. People Care promptly sought relief in the Supreme Court of New York. Its Verified Petition was properly granted in that Court's decision dated February 5, 2018, affirmed in *Matter of People Care Inc. v. City of New York Human Resources Admin.*, 175 A.D.3d 134 (1st Dep't 2019).

Question Presented

Did the Appellate Division, First Department, properly determine that HRA lacked authority to audit and recoup funds received by People Care from the Department of Health pursuant to Public Health Law § 2807-v(1)(bb)?

Counter-Statement of the Case

The Parties

Petitioner-Respondent People Care, a New York corporation, provides home health care to patients in New York City. (A. 253-54, ¶¶ 9-11.)

Respondent-Appellant HRA is an agency of the City of New York, formed pursuant to the Charter of the City of New York. Through contracts with HRA, People Care has provided Medicaid-funded home attendant and housekeeping services to elderly and/or disabled persons in the City of New York. (A. 253, ¶ 9.)

The Health Care Reform Act of 2000

The Health Care Reform Act of 2000 was signed into law by Governor Pataki at the end of 1999, and has since been amended on multiple occasions (as further amended, collectively referred to herein as HCRA). The statute created a framework for specific new health care programs in New York State, utilizing a new funding methodology derived from New York's recoveries in the tobacco litigation. These targeted funds are referred to as "HCRA grants" and are administered by New York State for certain specific enumerated statutory purposes.

The original HCRA statute, the Health Care Reform Act of 2000, adopted pursuant to Public Health Law § 2807-v and related provisions in the Social Security Law, directs specific grants to 19 areas denominated in subsections (a) through (s) of Section 2807-v(1). For each program, the statute awards specific amounts, by year, for a set number of years, to be funded through "[f]unds accumulated in the

tobacco control and insurance initiatives pool or in the health care reform act (HCRA) resources fund…." PHL § 2807-v(1).

In 2002, the Legislature amended HCRA to create additional new programs denominated subsections (x) through (cc), including the one at issue here in Section 2807-v(1)(bb). The purpose of this specific program was, *inter alia*, to provide funding for personal care providers, such as People Care, to improve their ability to recruit and retain qualified workers with direct patient care responsibilities. *See* PHL § 2807-v(1)(bb) (applicable within New York City); PHL § 2807-v(1)(cc) (applicable to providers outside the five boroughs).

Public Health Law § 2807-v(1)(bb)

To implement HCRA's mandate, Public Health Law § 2807-v(1)(bb) states in pertinent part:

> Funds accumulated in the tobacco control and insurance initiatives pool … including income from invested funds, shall be distributed or retained by the commissioner or by the state comptroller, as applicable, in accordance with the following:
>
> (bb)(i) Funds shall be deposited by the commissioner … *and computed and distributed in accordance with memorandums of understanding to be entered into between the state of New York and such local social service districts for the purpose of supporting the recruitment and retention of personal care service workers or any worker with direct patient care responsibility.*

PHL § 2807-v(1)(bb)(i) (emphasis added).

Public Health Law § 2807-v(1)(bb)(iii) sets forth the provider's obligation to use HCRA funds in the manner required by statute. The statute also defines the parameters of DOH's audit function over such funds:

> Each such personal care services provider shall submit, at a time and in a manner to be determined by the commissioner, a written certification attesting 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. *The commissioner [of DOH] is authorized to audit each such provider to ensure compliance with the written certification required by this subdivision* and shall recoup any funds determined to have been used for purposes other than recruitment and retention of non-supervisory personal care services workers or any worker with direct patient care responsibility. Such recoupment shall be in addition to any other penalties provided by law.

PHL § 2807-v(1)(bb)(iii) (emphasis added).

The HCRA-MOU

The State of New York, through DOH, and City of New York, through HRA, entered into the statutorily required "Memorandum of Understanding," dated November 15, 2002, covering HCRA grants funded under Public Health Law § 2807-v(1)(bb) (the "HCRA-MOU"). (A. 152-155.)

The HCRA-MOU deals with the "comput[ation]" of HCRA payments and their distribution or "[i]ssuance." (A. 154 ¶ 1 (computation), A. 154 ¶ 2 (issuance).) In paragraph 1, DOH designated the payments as "Medicaid rate add-ons" for personal care services "based on total claimed hours of service … for the 1999

calendar year…. (A. 154 ¶ 1.) In paragraph 4, the HCRA-MOU distinguished between the "add-ons" under HCRA and ordinary Medicaid funding:

> Medicaid rate adjustments issued pursuant paragraph 1 herein shall not be subject to subsequent retroactive revision or reconciliation, provided, however, that nothing in this Agreement shall be construed as precluding retroactive or prospective revisions to Medicaid rates for personal care services insofar as such revisions do not pertain to the rate adjustments described in paragraph 1 herein.

The HCRA-MOU expressly acknowledges and preserves DOH's statutory jurisdiction to audit the use of HCRA funds by service providers:

> WHEREAS, PHL § 2807-v(1)(bb) further provides *that [DOH] may audit each provider* receiving such a rate adjustment to ensure compliance with the provisions of said statute.

(A. 154 (emphasis added).) The HCRA-MOU contains no grant of audit or recoupment power by the DOH to HRA. Rather, the HCRA-MOU limits HRA's role to the ministerial task of collecting certifications and forwarding them to DOH. (*Id*.) The merger clause in the HCRA-MOU provides that it "constitutes the entire understanding reached between the parties…." (A. 154 ¶ 5.)

The Medicaid Program

People Care received HCRA funds pursuant to PHL § 2807-v(1)(bb) and the HCRA-MOU beginning in 2003, with some funds issued for the previous year. (A. 887, 961, 999.) People Care was also a recipient of Medicaid funds pursuant to contracts with HRA, which were in place long before the enactment of PHL § 2807-

v(1)(bb). As contemplated by the statute and the HCRA-MOU, the HCRA payments were "add-ons" to People Care's regular Medicaid funding for personal care services.

A review of the Medicaid program is necessary to understand the regulatory authority invoked by HRA, and to appreciate its lack of application to HCRA funds.

Medicaid, authorized by Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq*., is a "joint federal and state program designed to provide medical assistance" to needy individuals. *Catanzano v. Wing*, 103 F.3d 223, 225 (2d Cir. 1996). New York State participates in the Medicaid Program through a Medicaid state plan. *See* N.Y. Soc. Serv. Law § 363, *et seq*. The New York State DOH is designated, by federal law, as the State agency to administer and supervise New York's state plan. *See* 42 U.S.C. § 1396a(a)(5); 42 C.F.R. § 431.10; N.Y. Soc. Serv. Law § 363-a(1).[1] New York City is a local social services district with responsibility for establishing and administering certain Medicaid programs for its district. N.Y. Soc. Serv. Law §§ 62(1) & 365. HRA administers the Medicaid program in New York City and is generally referred to in that capacity as the "LSSD" for the City of New York.

[1] The New York State Department of Social Services had been the "single state agency" until the Department was reorganized in 1996. General supervision and authority over the Medicaid Program was transferred at that time, and all references in state law to the Department of Social Services and to the Commissioner of Social Services are now deemed to refer to the Department of Health and to the State Commissioner of Health, respectively. *See* 1996 N.Y. Laws, Ch. 474 and N.Y. Social Services Law § 2(1) & (6).

Personal Care Services Under the Medicaid Program

Since 1973, New York State has opted to provide "personal care services," such as those of home care attendants employed by People Care, as an integral component of its Medicaid program. *See* N.Y. Soc. Serv. Law § 365-a(2)(e); 18 NYCRR § 505.14; N.Y. Public Health Law § 3602(5). New York City's Medicaid-funded personal care services program at issue here is administered by HRA and is known as the "Home Attendant Program." (A. 254, ¶ 11.)

As authorized by 18 NYCRR § 505.14(c), People Care entered into periodically renewed contracts (the "Contracts") with HRA as an LSSD, which governed People Care's furnishing, through Medicaid, of personal care services to medical assistance recipients in the Bronx (beginning in 1997 and renewed or extended); Brooklyn (beginning in 2002 and renewed or extended); Queens (beginning in 2002 and renewed or extended); and Manhattan (beginning in 2002 and renewed or extended). (A. 253, ¶ 9.)

In Section 3.1(B), the Contracts provide for the "alternative rate methodology" or "ARM" as a basis to calculate Medicaid reimbursement rates. (A. 74); 18 NYCRR § 505.14(h)(7)(v). The ARM is a variation from the standard rate methodology used for many Medicaid providers.[2] The ARM included (i) a Direct

[2] Historically, reimbursement for personal care services furnished to medical assistance recipients was made at rates established by the LSSD. *Ulster Home Care, Inc. v. Vacco*, 268 A.D.2d 59, 62 (3d Dep't 2000), *rev'd on other grounds*, 96 N.Y.2d 505 (2001). While New York generally imposed a specific "cost-based" methodology for calculating Medicaid reimbursement rates,

Labor component; (ii) a general administrative component and indirect labor component, known by the acronym GAIL; and (iii) a profit factor for "proprietary" providers such as People Care. (A. 255, ¶ 14; A. 77, § 3.4). Each Contract also included a provision for audit and recovery of the ARM funds received by People Care. (A. 255, ¶ 14; A. 75-76, § 3.2.)

The ARM was established long before HCRA funds were issued. The Contracts too were executed before the HCRA statute was adopted. In Section 3.1(D), the Contracts provide:

> In the event that the New York State Department of Health's method of reimbursing the Contractor for Home Attendant Services is changed during the term of this Agreement, this Agreement shall be modified to reflect the new method of reimbursement.

(A. 75.)

The funds provided pursuant to HCRA were separate and distinct from other Medicaid funds, with different sources and different requirements, although the DOH distributed these funds as "add-ons" to existing Medicaid payments as contemplated by PHL § 2807-v(1)(bb). The HCRA grants were issued by DOH pursuant to an employee based formula required by the HCRA-MOU and PHL § 2807-v(1)(bb), and were available upon execution of the appropriate certifications

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codified at 18 NYCRR § 505.14(h)(7), HRA elected to apply a permitted exception, referred to as "alternative rate methodology" or "ARM." 18 NYCRR § 505.14(h)(7)(v).

as to intended use. The HCRA grants did not include any profit element. The Medicaid payments envisioned by the Contracts between People Care and HRA were based on the ARM formula, derived from a joint state and federal program, and based on a formula comprised of direct labor costs, specified administrative costs, and a profit element.

HRA's Audit, Closeout and Recovery Analysis and Impermissible Demand for Recoupment of HCRA Grants from People Care

On October 20, 2008, HRA delivered a closeout analysis for its audits of People Care for fiscal years 2003 and 2004. (A. 166-74.) HRA demanded that People Care pay certain alleged reimbursement payments from three (3) sources: (1) HCRA Homecare Worker Demonstration funds, a program under PHL § 2807-v(1)(m) (which are not at issue in this case); (2) HCRA Personal Care Worker Recruitment and Retention Program funds under PHL § 2807-v(1)(bb) (which are directly at issue on this appeal); and (3) Medicaid funds sought to be recouped based on the audit methodology contained in the ARM (which People Care has paid without challenge). (A. 259, ¶ 25 n.2; A. 166-174.)

Of the amounts demanded, $6,998,432 reflects HRA's demand for purported recoupment of HCRA grants made available by the DOH during the contract years at issue and awarded under PHL § 2807-v(1)(bb), the Personal Care Worker Recruitment and Retention Program. (A. 260, ¶ 27.) The record confirms that HCRA grants were received in 2003 and 2004 and not spent by the year end of the fiscal

year under audit. (A. 1107, 1041, 1074, 1143.) HRA took the position that unspent money had to delivered to HRA, and did not consider whether the funds had been properly spent after June 30, 2004, the last day of the fiscal year under review.[3] Neither HRA, nor the DOH, has initiated any challenge to the actual expenditures by People Care of the HCRA grants. Rather, HRA has insisted throughout that funds not spent or allocated for expenditure during the year subject to audit must be delivered to HRA.

People Care's Administrative Appeal and
HRA's March 11, 2009 Appeal Determination

By letter dated November 13, 2008, People Care duly and timely appealed from the cumulative closeout analysis rendered on October 20, 2008. People Care's appeal raised multiple grounds for annulment and vacatur of the audit, closeout and funds recovery analysis, including:

- HRA lacked the authority or jurisdiction to audit funds received under the HCRA Personal Care Worker Recruitment and Retention Program created pursuant to PHL § 2807-v(1)(bb), because they are not part of the approved rate under the ARM and the audit function for such HCRA

[3] Before the Appellate Division, HRA argued for the first time that People Care may have misspent the HCRA grants, citing litigation and a settlement from 2014, both outside the record on appeal. We address HRA's contentions in Point I.D., *infra*. HRA has neither audited nor examined the actual expenditures (which were indeed proper). Its sole basis for recoupment has been the fact that the HCRA grants were unspent by June 30, 2004 and People Care did not then have a plan for their expenditure.

funds is vested by statute in DOH and expressly reserved in the HCRA-MOU.

- The purported requirement that HCRA funds be expended in the fiscal year awarded is contrary to law, *ultra vires*, and arbitrary and capricious since the only statutory limitation placed on such funds under Public Health Law § 2807-v(1)(bb) is that the funds be expended for appropriate recruitment and retention purposes, without regard to the timing of such expenditures.

(A. 260-61, ¶ 28.)

HRA granted in part and denied in part People Care's appeal in an Appeal Determination rendered on March 11, 2009. HRA reversed the audit to the extent that it demanded recoupment of funds awarded under the HCRA Homecare Worker Demonstration Program under PHL § 2807-v(1)(m). HRA thus acknowledged that it lacked authority to recoup these funds. That reversal resulted in the reduction of HRA's demand by the amount of $2,500,888. (A. 261-62, ¶ 29.) As to the purported requirement that the HCRA Personal Care Worker Recruitment and Retention Program funds must be expended in the fiscal year awarded, HRA's Appeal Determination acknowledged that "*there is no specific provision in Public Health Law Section 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." (A. 179 (emphasis added).) HRA nonetheless reasserted its demand for recoupment 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." (A. 179.) HRA later revealed that the purported "DOH position" was based on a letter from Robert Veino, an associate attorney employed by DOH, dated February 24, 2009 (the "Veino Letter"). HRA has never cited any notice of the alleged "DOH position" prior to the Veino Letter, which was addressed to HRA after HRA issued its closeout analysis.

HRA also failed to address the fact that some of the HCRA funds were not received by People Care until the fiscal year following their grant, thus making HRA's argument that such funds must be spent in their grant year absurd. For example, the HCRA grants for 2002 was not received until fiscal 2003 (A. 887, 961, 999.) According to HRA, providers are required to spend funds that they have not received and then are subject to recoupment when the funds are issued.

Relevant Procedural History

People Care commenced this proceeding by filing a Verified Petition under Article 78, C.P.L.R., on June 25, 2009. (A. 250.) The Verified Petition sought a judgment annulling HRA's administrative determinations and its attempt to recoup

$6,998,432 of HCRA funds that People Care had received from New York State in fiscal years 2003 and 2004. *Id*. Every single dollar sought by HRA was expended by People Care pursuant to the HCRA statutory requirements, albeit not in the years under audit. (A. 267, ¶¶ 54-55.)

On December 21, 2009, the Supreme Court, New York County dismissed People Care's Petition for failure to state a claim. On November 15, 2011, the Appellate Division unanimously reversed, agreeing with People Care that under both PHL § 2807-v(1)(bb) and the HCRA-MOU, HRA lacked authority to audit and recoup the HCRA grants. *Matter of People Care Inc. v. City of New York Human Resources Admin.*, 89 A.D.3d 515 (1st Dep't 2011) ("*People Care I"*). The Court ruled:

> Public Health Law § 2807-v(1)(bb)(iii) provides that the state Commissioner of Health "shall recoup any funds determined to have been used for purposes other than recruitment and retention of non-supervisory personal care services workers or any worker with direct patient care responsibility." *Neither the statute nor the memorandum of understanding between the New York State Department of Health (DOH) and HRA delegates this power to HRA.* Significantly, respondents cite no specific statute or regulation to give them the power to recoup funds awarded pursuant to Public Health Law § 2807-v(1)(bb).

In re People Care, 89 A.D.3d at 516 (emphasis added). The Court remanded the case to provide HRA an opportunity to "develop the record" as to whether it could demonstrate any other basis for its claimed authority to recoup HCRA funds.

In response, HRA chose to do nothing in these proceedings for over five years. It finally answered the Petition on July 13, 2017. (A. 29-68.) On August 24, 2017, People Care filed a supplemental memorandum of law in support of its Petition. On February 5, 2018, the Trial Court (Rakower, J.) granted People Care's Verified Petition in a thoughtful seventeen-page Decision. (A. 10-28.) In her Decision, the Trial Court addressed in detail—and rejected—each of Appellants' claims regarding HCRA funds.

The Appellate Division, First Department, affirmed on July 23, 2019 in a three-to-two decision. *Matter of People Care Inc. v. City of New York Human Resources Admin.*, 175 A.D.3d 134 (1st Dep't 2019) ("*People Care II*").

The Appellate Division re-affirmed the holding in *People Care I* that "neither Public Health Law § 2807-v(1)(bb) nor the MOU between DOH and HRA delegated DOH's auditing and recoupment powers with respect to HCRA funds to HRA," a conclusion embraced by all Justices. 175 A.D.3d at 140, 143-45. The Appellate Division then reviewed, and rejected, each of the theories advanced by HRA in support of its claim to authority over HCRA funds.

First, HRA claimed an implied delegation from the DOH to audit and recoup HCRA funds through New York Social Services Law. The Appellate Division held that any such delegation must be "in conjunction with 'entering into memoranda of understanding' with any such other agencies," citing Social Services Law § 364-

a(1). *Id.* at 140. The HCRA-MOU, however, did not include any language delegating authority to audit and recoup HCRA funds. Indeed, its express language reserved that authority to the DOH. Moreover, there was no "interagency agreement" under Section 368-c(4) of the Social Services Law making such a delegation.

The Appellate Division also rejected HRA's claim to regulatory authority pursuant to 18 NYCRR Part 517 (Provider Audits) and Part 518 (Recovery and Withholding Payments and Overpayments). The regulations relied upon by HRA covered payments in connection with "a medical assistance program" under the Title 11 of Article 5 of the Social Services Law. "[T]he HCRA program is unquestionably not such a program," the Court ruled. *Id.* at 142. The references in the regulations granting authority to the "department" to audit and recoup funds also did not provide support for HRA's position. The term "department," the Court explained, is defined as the "State Department of Social Services which is now the DOH." *Id.* (citing 18 NYCRR § 515.1(b)(5)).

HRA also cited to language in the HCRA statute referring to "adjustments to Medicaid rates" and in the MOU, referring to HCRA funds as "Medicaid rate adjustments." These references, the Appellate Division held, "do not compel the conclusion that HCRA funds are to be treated as general Medicaid funds earmarked for a special purpose or, alternatively, as a subset of general Medicaid funds." *Id.* at 141. That issue, the Court ruled, would be determined by the Contracts between

HRA and People Care, and in particular whether the HCRA statute and the HCRA-MOU superseded or modified those Contracts.

The Appellate Division recognized that, in Section 3.1(D), the Contracts contemplated potential changes in reimbursement methods and provided for modification to their terms accordingly. The Appellate Division noted that the HCRA grants were computed by the DOH "independent of HRA's ARM methodology." The HCRA grants were issued on the condition that HRA receive a written certification that the funds would be used solely for purposes set forth in the statute. The Appellate Division thus concluded that "the MOU set forth a new methodology of reimbursement of HCRA funds to personal care services providers, including People Care." *Id.* at 141. The Court further found this methodology modified the existing Contracts, as permitted in Section 3.1(D) of the Contracts. "Under the modified method, non-HCRA general Medicaid funds remained subject to the preexisting ARM methodology, while HCRA funds were made subject to the new methodology authorized by Public Health Law §2807-v(1)(bb)…." *Id.* at 142. Both the power to audit and to recoup were reserved to the DOH, by statute, by regulations, and under the HCRA-MOU.

The Appellate Division likewise rejected HRA's reliance upon the Veino Letter and an affidavit provided by Robert Uhlberg, a DOH financial officer (the "Uhlberg Affidavit"), in July 2017. "Had HRA wanted a clear declaration from DOH

that the authority to audit and recoup HCRA funds had been delegated to it, HRA could have requested a delegation order from DOH, but failed to do so." *Id.* at 142-43.

The Appellate Division also addressed three points advanced by the Dissent. First, the Court rejected the suggestion that its decision in *People Care I* had left open the issue of HRA's rights under its Contracts with People Care. The Appellate Division observed that the Contracts were part of the record considered in *People Care I* and the Court "did not find that any auditing or recoupment authority was, or could have been, thereby conferred upon HRA." The Court ruled that, in remanding, it "necessarily rejected HRA's current argument that HCRA funds are the same as, or an earmarked portion or subset of, Medicaid funds." *Id.* at 140. If that were the case, the Court explained, the "remand of this case for development of the record as to whether HRA has a basis of authority other than the HCRA or the MOU would have been wholly unnecessary." *Id.*

The Appellate Division further found that the Dissent's conclusion regarding the Contracts "fails to consider that Public Health Law § 2807-v(1)(bb) and the MOU modified the audit and recoupment provisions for the portion of funds covered by the statute in the MOU, as contemplated by the 2001 contract's provision for modification of its terms to reflect a new method of reimbursement." *Id.* at 144.

Next, the Appellate Division considered that the Dissent's position that deference to HRA's position was appropriate based upon the Uhlberg Affidavit. The Court held that the clear language of the statute made reliance on Mr. Uhlberg's views inappropriate.

Last, the Court addressed the Dissent's contention that People Care was "estopped from challenging HRA's auditing and recoupment authority …" by accepting the HCRA funds without objection. The Appellate Division observed, "It is of no moment that HRA has acted in a manner consistent with its own view of its auditing and recoupment authority, a view not shared by People Care or this Court." *Id.* at 146.

The Dissent did not accept any of HRA's contentions regarding the HCRA statute, the HCRA-MOU, or the relevant regulations in 18 NYCRR. Rather, the Dissent relied on the Contracts between HRA and People Care as a grant to HRA of authority to audit and recoup Medicaid funds received by People Care, "including the HCRA funds at issue." *Id.* at 150. The Dissent argued that the remand in *People Care I* was intended to allow HRA an opportunity to demonstrate its authority under the Contracts. *Id.* at 151. According to the Dissent, HRA established its authority through its Verified Answer and the Uhlberg Affidavit, submitted in July 2017. *Id.* at 151-52.

Argument

I.

THE APPELLATE DIVISION PROPERLY HELD THAT RESPONDENT-APPELLANT HAS NO AUTHORITY TO RECOUP THE HCRA GRANTS AT ISSUE

A. The HCRA Statute, Social Services Law and New York Regulations Reserve Recoupment Power Over HCRA Grants to the DOH

Throughout its brief, HRA contends that its authority over general Medicaid funds comes with an implied mandate over the HCRA grants issued to People Care under PHL § 2807-v(1)(bb). A review of the HCRA statute and DOH regulations confirms a clear intent to leave these funds under the auspices of the DOH.

1. The HCRA Statute

All of the Justices who participated in *People Care I* and *People Care II* rejected HRA's claim to statutory authority over the HCRA grants. The Justices agreed that PHL § 2807-v(1)(bb) is crystal clear regarding the DOH's power to audit and recoup funds, providing, "The commissioner is authorized to audit each such provider to ensure compliance … and shall recoup any funds determined to have been used for purposes other than recruitment and retention of non-supervisory personal care services workers…." PHL § 2807-v(1)(bb)(iii); 89 A.D.3d at 516; 175 A.D.3d at 140.

The plain language of the statute authorizes the DOH, not HRA, to "recoup any funds" determined to have been improperly used. PHL § 2807-v(1)(bb)(iii). The

Court should apply the statutory text as written. *DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660 (2006) ("When presented with a question of statutory interpretation, our primary consideration 'is to ascertain and give effect to the intention of the Legislature'. The statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning." (citations omitted)); *Desrosiers v. Perry Ellis Menswear, LLC*, 30 N.Y.3d 488, 494 (2017) ("'The statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning.'").

The history of this case reinforces adherence to the statutory language. "'It is a recognized principle that where a statute has been interpreted by the courts, the continued use of the same language by the Legislature subsequent to the judicial interpretation is indicative that the legislative intent has been correctly ascertained' … the persuasive significance of legislative inaction in this context carries more weight where the legislature has amended the statute after the judicial interpretation but its amendments 'do not alter the judicial interpretation'…." *Desrosiers*, 30 N.Y.3d at 497.

Since the Appellate Division ruling in *People Care I* in 2011, the legislature has amended PHL § 2807-v(1) at least three times, without any change to the language granting the DOH audit and recoupment authority over grants under subsection (bb). The legislative acceptance of the ruling in *People Care I* confirms

the intent of the HCRA statute and spells the end for HRA's claim to implied authority. *Knight-Ridder Broad., Inc. v. Greenberg*, 70 N.Y.2d 151, 157 (1987) ("it is a recognized principle that where a statute has been interpreted by the courts, the continued use of the same language by the Legislature subsequent to the judicial interpretation is indicative that the legislative intent has been correctly ascertained"); *Orinoco Realty Co. v. Bandler*, 233 N.Y. 24, 30 (1922) ("When the Legislature amends or considers afresh a statute it will be assumed to have knowledge of judicial decisions interpreting the statute as then existing and if it deals with it in a manner which does not rebut or overthrow the judicial interpretation, it will be regarded as having legislated in the light of and as having accepted such interpretation.").

HRA argues that its authority to audit and recoup HCRA funds should be assumed because the Legislature did not explicitly state that HRA could not do so, even though the Legislature named only DOH as the entity with authority to "recoup any funds" determined to have been improperly spent pursuant to Public Health Law § 2807-v(1)(bb)(iii). The cases cited by HRA for its claim of implied authority are inapposite, and in fact support People Care's position. For example, in *Auerbach v. Board of Educ.*, 86 N.Y.2d 198 (1995) (Br. at 39), the Court relied on a "statute's plain language" to affirm the holding below, and rejected the argument that "silence as to the statute's effect" in the "legislative history" such as the Bill Jacket "indicate[s] an intent to exclude [certain] employees" from the reach of the statute

in a manner that was contrary to the statute's plain language. In *McGowan v. City of New York*, 53 N.Y.2d 86 (1981) (Br. at 38), the Court held that the "long-established practice" at issue was consistent with statutory language and that there were "affirmative statements that the bill was to give legislative sanctions to a pre-existing custom." Unlike those cases, here, HRA is arguing that the plain language of the HCRA statute granting recoupment power only to the DOH should be ignored simply because the Legislature did not refer to HRA or its ability to audit and recoup certain general (non-HCRA related) Medicaid funds.

HRA also relies upon a snippet of the HCRA statute, which references that "Funds shall be deposited by the commissioner … for the purpose of supporting the state share of adjustments made to Medicaid rates of payment to personal care services…." to argue for an implied grant of authority. PHL § 2807-v(1)(bb)(i). The appearance of the word "Medicaid" does not alter the analysis. The balance of the statute makes clear that the DOH has power to audit and recoup these funds.

The reference to Medicaid in the statute merely requires that the recipients of the grants be personal care service providers under Medicaid pursuant to Social Security Law § 365-a(2)(e) (covering personal care services) and that the payments will be made through rate adjustments or "add-ons."

HRA has already admitted that it is not authorized to recoup funds similarly appropriated under the HCRA Homecare Worker Demonstration Program created

pursuant to Social Services Law 367-o and PHL § 2807-v(1)(m), another HCRA program. (A. 179.) HRA previously sought to recoup Homecare Worker Demonstration Program HCRA funds from People Care, but later dropped its claim after People Care objected. (A. 273.) HRA has since explained that the flow of funds in this program directly from the DOH to People Care placed the grants outside HRA's purview. (A. 35, ¶ 22; A. 56-57, ¶¶ 119-22.) HRA's explanation provides no colorable basis to distinguish between the two programs under HCRA, both of which arise under PHL § 2807-v(1). That these programs should be treated similarly is evident on the face of the applicable statutory provisions which contain almost identical language. *Compare* NY Soc. Serv. Law § 367-o(3-a)(c) (referring to "adjust[ments]" to "rates of payment," and stating that "[t]he commissioner of health is authorized to audit such providers for the purpose of ensuring compliance with the provisions of this paragraph and shall recoup any funds determined to have been used for purposes other than as authorized by this subdivision") *with* N.Y. Pub. Health Law § 2807-v(1)(bb)(iii) (referring to "adjust[ments]" to "rates" and stating that "[t]he commissioner is authorized to audit each such provider to ensure compliance with the written certification required by this subdivision and shall recoup any funds determined to have been used for purposes other than recruitment and retention of non-supervisory personal care services workers or any worker with direct patient care responsibility").

2. HRA Has No Regulatory Authority to Recoup the HCRA Grants

Before the lower courts, HRA claimed authority under New York regulations governing Medicaid provider audits, 18 NYCRR §§ 517-518. As the Appellate Division found, HRA's claim is contrary to the plain terms of Parts 517 and 518 of 18 NYCRR, which cover audit and recoupment for these programs. 175 A.D.3d at 142. In fact, the plain language of the regulations confirms that only the DOH could have such authority. While HRA has abandoned this claim on appeal, a review of the regulations confirms the absence of any basis for implied authority by HRA over HCRA grants.

The relevant portions of 18 NYCRR §§ 517-518 refer to "overpayments" in connection with "medical assistance programs." *See, e.g.,* 18 NYCRR §§ 517.3, 518.1. The term "medical assistance program" is defined as "the program of medical assistance for needy persons *provided for in title 11 of article 5 of the Social Services Law*." 18 NYCRR § 504.1(d)(13) (emphasis added). The Appellate Division ruled that the HCRA statute, PHL § 2807-v(1)(bb), is not under Title 11, Article 5 of the Social Services Law. 175 A.D. 3d at 142. (*See also* A. 22.)

Section 505.14 of 18 NYCRR establishes the standard payment formula for personal care services, a formula *not* used in the Contracts with People Care. Having established this standard payment formula, the regulations go on to provide that the regulations relied on by HRA, *i.e.*, "Parts 517, 518 and 519 of this Title, which

concern provider audits, recoveries of overpayments and provider hearings respectively, apply to audits of, recoveries of overpayments from, and hearings granted to providers subject to the requirements of this paragraph." 18 NYCRR § 505.14(h)(7)(iv). Accordingly, only providers who are compensated according to the standard payment formula set forth in 18 NYCRR § 505.14 are subject to the audit and recoupment provisions contained in Parts 517 and 518. People Care is compensated on the ARM formula, not the formula set out in Section 505.14.

The text of Parts 517 and 518 further confirms that these audit and recoupment provisions do not apply to People Care's Contracts. For example, Section 517.3 establishes the audit function for "cost-based providers" which file fiscal and statistical records and reports with a State agency that are to be "used for the purpose of establishing rates of payment." 18 NYCRR § 517.3. However, HRA contractors, such as People Care, do not file fiscal reports to the State for establishment of rates of payment.

Similarly, Section 518.5 requires that "any person from whom recovery is sought is entitled to a notice of the overpayment and an opportunity to be heard in accordance with the procedures established under Part 519." 18 NYCRR § 518.5. The audit, recoupment and hearing rights provided for in Part 519 are not the ones used by HRA with People Care.

There is a deeper flaw in HRA's claim to implied or actual authority. Even if the regulations were applicable to HCRA funds, Parts 517-518 of 18 NYCRR authorize only the DOH, and not HRA, to recoup. While "authorized local, State or Federal agencies" may conduct audits, reviews and investigations, the regulations provide that only the "Department"—*i.e.*, DOH—is authorized to recoup overpayments. 18 NYCRR § 518.1(d); *Id.* § 518.8(a) ("[t]he *department* may … commence recoupment of overpayments." (emphasis added)).

The Appellate Division correctly ruled that HRA is not included within the definition of "Department" for purposes of authorizing recoupment of funds. 175 A.D.3d at 142 (citing 18 NYCRR § 515.1(b)). HRA's claim of implied authority thus requires the Court to override and revise current regulations regarding provider audits.

3. The Social Services Law Does Not Authorize HRA to Recoup HCRA Grants

Before the lower courts, HRA also claimed an implied delegation under the Social Services Law. The Court in *People Care II* found no support in the statute for HRA's claim. 175 A.D.3d at 140. On appeal, HRA has abandoned this theory as well. A review of the Social Services Law, as detailed in *People Care II* and by the Trial Court (A. 10-28), is nonetheless instructive to rebut HRA's implied authority theory.

Social Services Law § 368-c provides that the DOH "may conduct, or have conducted," audits of financial and statistical reports used for the purpose of establishing rates of payments or fees, and that the DOH "shall enter into interagency agreements, subject to the approval of the director of the budget, to delineate the respective responsibilities of the department and other governmental agencies with respect to this section." Social Services Law §§ 368-c(1), 368-c(4). But there is no interagency agreement with HRA governing the HCRA funds other than the HCRA-MOU, which does not authorize HRA to audit or recoup HCRA grants.

Based on the foregoing, the Appellate Division properly held that HRA lacks any statutory or regulatory authority, either express or implied, to audit and recoup HCRA grants.

B. HRA Has No Contractual Authority to Recoup the HCRA Grants

On this appeal, HRA relies heavily on its Contracts with People Care, embracing the analysis of the Dissent in *People Care II*. In other words, regardless of the statutory and regulatory language governing the HCRA grants, HRA contends that the audit and recoupment provisions in those Contracts apply since the funds were issued as Medicaid "add-ons." The Appellate Division correctly rejected this theory.

To start, the Contracts do not address, and could not have addressed, the HCRA grants for a simple reason: The Contracts pre-date the HCRA statute. 175

A.D.3d at 144. The audit and recoupment provisions in paragraph 3.2(A) of Part I of the Contracts extend to "Payments" in excess of "Allowable Payments." (A. 75-76.) These terms apply only to the calculations under the ARM formula in Paragraph 3.4 of Part I of the Contracts. (A. 77.) The term "Allowable Payments" covers "… those expenditures for labor, services and equipment made by the Contractor which are determined by the Department to be in accordance with this Agreement and the Contractor's approved budget and which are reasonable and necessary to the Contractor's proper discharge of its obligations hereunder." (A. 71.) This definition does not apply to the HCRA grants, which are not part of an approved budget. The HCRA grants are computed in conformance with paragraph 1 of the HCRA-MOU.

The HCRA grants, moreover, are not a component of the contractual "Rate" set by Sections 3.1 and 3.4 of Part I of the Contracts, which provides the basis for "Allowable Payments." Under the Contracts, the "Rate" is based on three specific components: direct wages and fringe benefits, indirect wages and fringe benefits and other than personal services (collectively known as "GAIL") and 3% profit on the direct labor and GAIL components of the rate. (A. 77). While the Contracts permit providers to include a 3% profit in the "Rate," they may not take any profit from HCRA grants. The HCRA grants are "add-ons" to the "Rate" (as defined in the Contracts) and outside any "approved budget" with HRA. Under their plain

language, the Contracts do not provide any basis under which HRA may recoup HCRA funds. *Id.*

The facts here demonstrate the incompatibility of the HCRA grants with the audit and recoupment of ordinary Medicaid funds pursuant to the Contracts' "Rate." HRA's decision to treat the HCRA funds as Medicaid payments resulted in an order in 2008 demanding their return as "unspent" in 2003 and 2004 based solely on the fact that the grants were not spent in an annual audit cycle, along with ordinary Medicaid funds. People Care used the HCRA grants for a proper purpose in the years after the audit, and therefore had no ability to turn them over to HRA. Under HRA's position, moreover, the HCRA grants go to HRA, not personal care workers. Once paid to HRA, People Care has no right to obtain the funds in later years and so its employees could not benefit from them. Surely the legislature did not intend a result that deprives personal care workers of the benefits of PHL § 2807-v(1)(bb).

Relying on Section 3.1(D) of Part I of the Contracts, the Appellate Division correctly held that the HCRA grants represented a change to the DOH's method of reimbursing People Care. 175 A.D.3d at 142 (quoting Section 3.1(D) (A. 75)). The Appellate Division thus concluded that this change in reimbursement resulted in a modification to the Contracts, with the HCRA grants audited and recouped by the DOH while HRA retained its authority over Medicaid funds. Its holding implements

Section 3.1(D) of each Contract, which further provides, "this Agreement shall be modified to reflect the new method of reimbursement." 175 A.D.3d at 147; (A. 75).

Again, HRA relies on the fact that the HCRA grants were paid as "add-ons" to the Medicaid payments under the Contract. That fact, however, does not support HRA's claim that the HCRA grants are indistinguishable from regular Medicaid funds. The language of the Contracts, the statutory and regulatory structure, and the undesirable outcomes arising from HRA's position, all confirm the soundness of the Appellate Division ruling.

The Trial Court's ruling provides an alternative ground to reject HRA's contract theory. The Trial Court held that the Contracts could not be construed to deprive the DOH of its authority under PHL § 2807-v(1)(bb). The Trial Court explained, "[w]hether the [c]ontract permits HRA to audit and recoup HCRA funds is moot" because "[a]ny provisions empowering HRA to audit and recoup People Care's HCRA funds would contravene Public Health Law § 2807-v(1)(bb)(iii) and constitute an unlawful undertaking." (A. 27.) At the very least, the Contracts should be construed consistent with the express language of PHL § 2807-v(1)(bb).

C. The Memorandum of Understanding Does Not Support HRA's Alleged Recoupment Rights

PHL § 2807-v(1)(bb) contemplates "memorandums of understanding" with the DOH to address how the grants will be "computed and distributed." PHL § 2807-v(1)(bb)(i). The HCRA-MOU implements this language. (A. 152-55.) The Appellate

Division in *People Care I* ruled that "[n]either the statute nor the memorandum of understanding between the New York State Department of Health (DOH) and HRA delegates this power [to recoup HCRA funds] to HRA." 89 A.D.3d at 516. The Court in *People Care II* agreed, and the Dissent offered no challenge. 175 A.D.3d at 140. The lower court's holding is consistent with the plain terms of HCRA-MOU, especially when read in the context of the statute and regulations.

Consistent with the statute, the HCRA-MOU recites that the DOH has the power to "audit each provider receiving such a rate adjustment." (A. 154.) Further, it identifies the role to be played by HRA, namely to gather "written certifications" as to the proper use of HCRA grants "which NYHRA shall promptly forward to … [DOH]." (*Id.* ¶ 2.) No further role is specified. Significantly, the HCRA-MOU provides that the written document "constitutes the entire understanding reached between the parties…." (*Id*. ¶ 5.)

HRA makes much of the fact that the reference to DOH's audit power appears in a contract recital. While recitals may not comprise contractual terms, they certainly provide a framework for understanding the intent of the parties. *See Potter v. Padilla*, 143 A.D.3d 1246, 1247 (4th Dep't 2016) ("recital paragraphs may be used to 'assist in determining the proper construction of a contract'"); *Musman v. Modern Deb, Inc.*, 56 A.D.2d 752, 753 (1st Dep't 1977) (recital clause can control where operative clause is ambiguous); *Maloney v. Iroquois Brewing Co.*, 173 N.Y.

303, 307 (1903) ("recitals" were "important in ascertaining the intention of the parties and the scope and meaning of the instrument"). The fact that DOH saw fit to include such a recital makes clear its intent to retain, rather than delegate, the authority conferred in PHL § 2807-v(1)(bb)(iii). This conclusion is reinforced by the merger clause in the HCRA-MOU, which on its face prohibits the alleged agreement advocated by HRA. *Jarecki v. Shung Moo Louie*, 95 N.Y.2d 665, 669 (2001) ("The purpose of a merger clause is to require the full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to alter, vary or contradict the terms of the writing.").

HRA also claims that the reference to the Medicaid Information Management System ("MIMS") in the HCRA-MOU implies a grant of audit and recoupment authority. Section 1 of the HCRA-MOU refers to the MIMS system as a source for inputs in the formula to be used to compute the "add-ons." (A. 154.) Nothing in Section 1 supports any broader grant to HRA. The Appellate Division correctly ruled that recoupment authority was neither expressly nor impliedly conferred by the HCRA-MOU.

D. HRA Has Provided No Basis to Defer to the DOH and No Rational Basis for Its Conclusions

HRA also argues that the Court "should defer to DOH's rational interpretation and application of the statute." Br. at 49. HRA apparently relies on the Uhlberg

Affidavit and the Veino Letter as support for the alleged DOH "rational interpretation."

HRA offers no legal precedent in which courts have treated materials of this nature as the agency interpretation of a statute. Mr. Uhlberg is not even an attorney and could not possibly "interpret" PHL § 2807-v(1)(bb). HRA provides no explanation for its failure to obtain an amendment to the HCRA-MOU or an actual opinion from the Commissioner.

The opinions of Messrs. Veino and Uhlberg, in fact, are both meaningless and contrary to the statute. Mr. Uhlberg, the Medicaid CFO for the DOH, has no legal training and could not possibly offer an official agency position concerning the HCRA statute or the HCRA-MOU. His observation that "HCRA funds … are in all legally relevant respects Medicaid funds" is entitled to no weight. (A. 217, ¶ 8.) Mr. Veino, an associate attorney at the DOH, does not fare better. His letter endorses HRA's alleged audit powers, but he provides no support for their application of annual payment requirements or rationale for his view.

The Appellate Division properly concluded that these opinions were contrary to the plain terms of the statute, the HCRA-MOU, and New York regulations covering audits and recoupment. 175 A.D.3d at 143. As this Court has held, agencies' interpretations of such statutes and regulations are not entitled to deference where those interpretations "conflict[ ] with the plain meaning of the promulgated

language." *Visiting Nurse Serv. of New York Home Care v. New York State Dep't of Health*, 5 N.Y.3d 499, 506 (2005). In *Visiting Nurse Service of New York Home Care*, this Court rejected DOH's interpretation of "overpayment" under Medicaid regulations as inconsistent with the plain language of those regulations. Here, as in *Visiting Nurse Service*, DOH's claimed interpretation should be rejected.

The Appellate Division in *People Care II* properly held:

> "Where the question is one of 'pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency' …, and no deference is required" (*City Council*, 4 AD3d at 97, quoting *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]).

175 A.D.3d at 145 (quoting *Matter of New York City Council v. City Of New York*, 4 A.D.3d 85 (1st Dep't 2004)).

Last, HRA argues that its recoupment order was rational based on speculation that People Care did not spend the HCRA grants properly. HRA's recoupment demand, however, was *not* based on the speculation that appears in the final pages of its brief. Nor has it ever audited the actual expenditures by People Care. Rather, HRA's recoupment demand was based solely on its claim that People Care did not spend the HCRA grants in the years in which they were awarded. (A. 273-80.)

Before the Appellate Division, HRA argued for the first time that People Care's "employee stock ownership plan" was an unauthorized purpose under

HCRA. Br. at 49-50. Its Answer to the Verified Petition made no mention of this theory. HRA has never explained why granting employees ownership interests through a benefit plan established pursuant to federal law would not serve to promote the "recruitment and retention" of workers—the statutorily mandated purpose for such funds. This Court, like the Appellate Division, should decline to consider this belated theory because it was not raised below. *See Lawlor v. Lenox Hill Hosp.*, 74 A.D.3d 695, 696 (1st Dep't 2010).

In footnotes to materials outside the record, HRA cites to a class action against the ESOP Trustee and a settlement agreement with the U.S. Department of Labor. The class action claims were not asserted against People Care or its officers; the settlement with the DOL resolved all issues, without any adverse finding. HRA's belated reliance on these events from 2014 as support for its determinations in 2008, if anything, underscores the error in HRA's invocation of Medicaid audit power to recoup grants under PHL § 2807-v(1)(bb). Moreover, the documents HRA cites in support of this claimed theory (Br. at 50) are outside of the record, and should not be considered on this appeal. *Andon ex rel. Andon v. 302-304 Mott St. Assocs.*, 94 N.Y.2d 740, 746–47 (2000).

E. HRA's Waiver Claim Has No Merit

HRA also contends that People Care waived all objections to its purported exercise of authority by accepting the HCRA grants in 2003 and 2004. (Br. at 15,

31-32.) No waiver could arise from People Care's acceptance of funds for the benefit of its employees, when the HCRA statute entitled People Care and the employees to the benefit of those grants. *See Jefpaul Garage Corp. v. Presbyterian Hosp. in City of New York*, 61 N.Y.2d 442, 446 (1984) ("A waiver is the voluntary abandonment or relinquishment of a known right. It is essentially a matter of intent which must be proved."). People Care promptly objected to HRA's efforts to audit and recoup funds issued in 2007 under PHL § 2807-v(1)(m). (A. 1212.) HRA's efforts to exercise audit and recoupment power over grants under PHL § 2807-v(1)(bb) did not occur until 2008, when it audited fiscal years 2003 and 2004. People Care objected at the time and has since pursued its objections with vigor. (A. 887, 924, 961, 999.) HRA in effect asks the Court to find that a waiver occurred before HRA had even articulated its groundless claim to authority over the HCRA grants.

Conclusion

For the reasons set forth herein, Petitioner-Respondent People Care respectfully submits that the Decision of the Appellate Division, First Department should be affirmed.

Dated: New York, New York
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CERTIFICATE OF COMPLIANCE

The foregoing brief was prepared on a computer using Microsoft Word, using Times New Roman 14 point typeface, except footnotes which are in Times New Roman 12 point typeface. The total number of words in this brief, excluding the table of contents, table of authorities, cover sheet, disclosure statement, proof of service, and this statement is 9,078.