



**Department
of Health**

KATHY HOCHUL
Governor

JAMES V. McDONALD, MD, MPH
Commissioner

JOHANNE E. MORNE, MS
Executive Deputy Commissioner

December 8, 2025

CERTIFIED MAIL/RETURN RECEIPT

Enoch Kun, Esq.
NYS OMIG
800 North Pearl Street
Albany, New York 12204

David Tosetto, President
Mount View Assisted Living, Inc.
5465 Upper Mountain Road
Lockport, New York 14094-1854

RE: In the Matter of Mountain View Assisted Living, Inc.

Dear Parties:

Enclosed please find the Decision After Hearing in the above referenced matter.

If the appellant did not win this hearing, the appellant may appeal to the courts pursuant to the provisions of Article 78 of the Civil Practice Law and Rules. If the appellant wishes to appeal this decision, the appellant may wish to seek advice from the legal resources available (e.g. the appellant's attorney, the County Bar Association, Legal Aid, OEO groups, etc.). Such an appeal must be commenced within four (4) months after the determination to be reviewed becomes final and binding.

Sincerely,

A handwritten signature in black ink that reads "Natalie J. Bordeaux".

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB:nm
Enclosure

**STATE OF NEW YORK
DEPARTMENT OF HEALTH**

COPY

In the Matter of the Appeal of :

MOUNT VIEW ASSISTED LIVING, INC. :
Medicaid Provider #04245841 :

from a determination to recover Medicaid :
Program overpayments. :

**DECISION
AFTER
HEARING**

Audit No. 24-6742

Before: Jeanne T. Arnold
Administrative Law Judge

Hearing date: October 30, 2025
By WebEx Videoconference
Record closed November 10, 2025

Parties: NYS Office of the Medicaid Inspector General
800 North Pearl Street
Albany, New York 12204
By: Enoch Kun, Esq.

Mount View Assisted Living, Inc.
5465 Upper Mountain Road
Lockport, New York 14094-1854
By: David Tosetto, President

JURISDICTION

The New York State Department of Health (Department) is the single state agency for the administration of the Medical Assistance (Medicaid) Program in New York State. 42 USC § 1396a; Public Health Law (PHL) § 201(1)(v); Social Services Law (SSL) § 363-a. The New York State Office of the Medicaid Inspector General (OMIG), an independent office within the Department, is authorized to investigate and pursue civil and administrative enforcement actions to recover improperly expended Medicaid funds. PHL §§ 31-32.

The OMIG determined to recover Medicaid Program overpayments from Mount View

Assisted Living, Inc. (Appellant) for the rate period October 1, 2021 through March 31, 2024. The Appellant requested this hearing pursuant to SSL § 145-a and former Department of Social Services regulations at 18 NYCRR 519.4 to review the overpayment determination.

HEARING RECORD

OMIG Witness: Matthew Epstein, Audit Supervisor
OMIG Exhibits: 1 - 6
Appellant Witnesses: David Tosetto, President
Renee Hund, Director of Human Resources
Appellant Exhibits: A-C

A transcript of the hearing was made. (T pages 1-86.) The record closed on November 10, 2025 when the transcript was received.

STATEMENT OF FACTS

1. The Appellant is a corporation which operates Mount View Assisted Living in Lockport, New York. It has 150 Assisted Living Program (ALP) beds providing Medicaid residents with the services of an adult care facility licensed under PHL Article 46-B, and the services of a home care services agency licensed under PHL Article 36 (LHCSA). (T 9.)

2. The Appellant is an “employer” under the Health Care and Mental Hygiene Worker Bonus (HWB) program and was required to pay worker bonuses to employees pursuant to a vesting schedule issued by the Department. SSL § 367-w (2)(b), (4). The HWB program was implemented to attract talented people into professions of “essential front line health care” workers and to reward such workers because they “[saw] us through” the COVID-19 public health crisis. SSL § 367-w(1).

3. The Appellant was responsible for determining whether its employees were eligible for a HWB program bonus and for maintaining all records, data and information it relied on in

deciding whether employees were eligible. SSL § 367-w(3)(c).

4. The Appellant paid bonuses to certain employees who it believed qualified for the HWB program bonus, and both sought reimbursement and was reimbursed for some of the bonuses by the Medicaid Program.

5. In October 2024, the OMIG commenced an audit of 114 HWB program claims, totaling \$144,000, paid to the Appellant from October 1, 2021 through March 31, 2024. (Exhibits 1, 2.)

6. On March 24, 2025, the OMIG issued a draft audit report (DAR) which identified two categories of error in the claims paid to the Appellant: 1) bonuses incorrectly paid to ineligible employees; and 2) incorrect amounts of worker bonuses paid to employees. The OMIG sought to recover a Medicaid overpayment of \$40,368. (Exhibit 2.)

7. The DAR advised the Appellant, pursuant to 18 NYCRR 517.5, that it was entitled to submit objections to the proposed action, which objections were required to include any additional material or documentation that the Appellant wished to be considered. (Exhibit 2.) The Appellant submitted objections to the DAR. (Exhibit 3.)

8. On May 20, 2025, the OMIG issued a final audit report (FAR) which advised the Appellant that, upon review of its objections, the overpayment was reduced to \$32,833.25. (Exhibit 5.)

9. By letter dated July 16, 2025, the Appellant requested this hearing to review the determination and findings set forth in the FAR. (Exhibit 6.) At the hearing, the Appellant indicated that it was not contesting the FAR's second finding (T 83) and seeks review only of the first finding regarding bonuses allegedly incorrectly paid to ineligible employees.

ISSUE

Was the OMIG's determination that the HWB was paid to twelve ineligible employees correct?

APPLICABLE LAW

Social Services Law § 367-w was enacted to recruit, retain, and reward health care and mental hygiene workers by awarding financial bonuses for certain front line health care and mental hygiene workers during the 2023 fiscal year. The statute lists employees by title and function who are eligible for bonuses during a series of six-month "vesting periods" between October 1, 2021 and March 31, 2024. SSL § 367-w(2)(d).

Social Services Law § 367-w(2) defines "Employee":

(a) Employee means certain front line health care and mental hygiene practitioners, technicians, assistants and aides that provide hands on health or care services to individuals, without regard to whether the person works full-time, part-time, on a salaried, hourly, or temporary basis, or as an independent contractor, that received an annualized base salary of one hundred twenty-five thousand dollars or less, to include:

(i)&(ii) [job titles, including "**all other health care support workers,**" are listed in 367-w(2)(a)(i)&(ii)]; and

(iii) such titles as determined by the commissioner, or relevant agency commissioner as applicable, and approved by the director of the budget.

SSL § 367-w(2)(a)(i)(ii)&(iii).

The Department developed informational documentation to assist providers, *inter alia*, in determining which of its employees were entitled to the bonus including its NYS Healthcare Worker Bonus Program Frequently Asked Questions (FAQ), Last Updated 2/12/2025,¹ New York State Health Care and Mental Hygiene Worker Bonus (HWB) Program brochure (Exhibit A), and

¹ https://www.health.ny.gov/health_care/medicaid/providers/hwb_program/hwb_program_faq.htm

Bonus Requirements brochure (Exhibit B).

Most of the listed job titles in the law were “pulled directly from the Bureau of Labor Statistics (BLS)” and “the definition of each BLS job title is available on O*Net Online.”² HWB FAQs p 17. “[A]ll other health care support workers” refers to workers that support the provision of health care services to patients in front-line settings for these titles. “Such workers must provide patient-facing care provided within a patient care unit of a hospital or other institutional medical setting in support of treating and caring for patients.” FAQs p 15. The FAQs, at pages 16-17, list “all other patient facing care support workers in Article 28 facilities.” (*See also* Exhibit A p 5.)

In addition, the HWB program was expanded to include additional titles including home health care managers, security guards, peace officers. The employers permitted to submit bonus claims for ‘all other health care support corksers’ was expanded beyond hospitals and nursing homes to include Medicaid Assisted Living Programs (PHL Article 46-b). (Exhibit A p 4.)

The Eligibility (Qualified Employers) Section of the FAQs advises providers:

Q. Is the bonus for the Home Attendants/Aides? Are any staff for CHHAs, LHCSAs and Fls included?

A. Homecare aides are not an eligible title for the Bonus Program as they will be eligible for increased minimum wage payments pursuant to PHL 3614-f. As such, employee of Article 36 entities that fall under such titles (e.g. home health Aide, Personal Care assistant, home maker, etc.) are not eligible for the Bonus. However, certain Article 36 entities, such as Certified Home Health Agencies (CHHAs) and Licensed Home Care Services Agencies (LHCSAs), may employ eligible titles (e.g. Nurses, PT/OT Therapist, Speech Pathologists, etc.) that provide hands-on services, and may be eligible for the bonus if they meet all of the employee eligibility requirements. Fiscal intermediaries under [SSL] section 365-f do not employ eligible titles that provide hand-on services, and so are not subject to the requirements under the Bonus program.

(FAQs p 3.)

² <https://www.onetonline.org>

The Department developed forms and procedures to identify the number of hours employees worked and to reimburse employers for HWB program bonuses paid. Employers were required to determine employee eligibility for the HWB before paying bonuses and seeking reimbursement from the Department and to maintain and make available upon request all records, data and information relied upon in determining that an employee was eligible for the HWB. SSL § 367-w(3)(c). Employers were required to track the number of hours employees worked during each vesting period and submit reimbursement claims for HWB payments to the Department. SSL § 367-w(3)(b)(i). The HWB claim submission process also required qualified employers to electronically sign an attestation confirming that the employer determined each employee included in the claiming process was eligible for the bonus.

Employers shall maintain contemporaneous records for all tracking and claims related information and documents required to substantiate claims submitted for HWB payments for a period of no less than six years and shall furnish records and information, on request, to the OMIG. SSL § 367-w(3)(d). The OMIG is tasked, in coordination with the Commissioner of Health, with conducting audits, investigations and reviews of employers required to submit claims for the HWB. Inappropriately paid HWB claims constitute overpayments pursuant to 18 NYCRR §§ 518.1(b)-(c). SSL § 367-w(5). If the Department determines to recover an overpayment, a Medicaid provider has the right to an administrative hearing. 18 NYCRR 519.4. The Appellant has the burden of showing that the OMIG's determination was incorrect and that all claims submitted were due and payable. 18 NYCRR 519.18(d)(1).

DISCUSSION

At the hearing, the OMIG presented the audit file and summarized the case, as required by 18 NYCRR 519.17. The Appellant is contesting only the first category of findings of the FAR

which disallowed 21 HWB reimbursement claims (sample numbers 13-14, 25-26, 30-31, 37-38, 48-49, 52-54, 69-70, 88-89, 94-95, 100-101) pertaining to 12 employees. The OMIG determined that the employees were ineligible to receive the bonuses as they did not qualify as a HWB program “employee” pursuant to Social Services Law § 367-(w)(2)(a) and the HWB program FAQs. (Exhibit 5 pp 5-6.)

For sample numbers 30, 31, 37, 38, 52, 53, 54, 100 and 101, the employee title at issue is **home health aide** (HHA). The OMIG auditor disallowed these claims pursuant to the Social Services Law, the FAQs, and because home health aides received a minimum wage increase. (T 19, 23, 28-29.) The law does not include the title HHA as an employee (SSL § 367-[w][2][a]) and the FAQs specifically exclude HHAs from eligibility for the bonus. In an administrative hearing decision, *Amber Court of Brooklyn ALP* (Audit #24-4935, issued December 1, 2025, ALJ Natalie Bordeaux), it was determined that because HHAs are neither identified in the statutory definition of ‘employee’ for purposes of the HWB, nor listed in the FAQs as HWB-qualifying ‘all other health care support workers,’ employees working under this title are excluded from receiving the bonuses. *Amber Court Decision*, at p 13.

Social Services Law § 367-w(2)(a)(i)(ii) lists almost 100 employment titles that qualify as “employee[s]” entitled to the bonus. Although the statutory definition includes a catch-all entitling “all other health care support workers” to the bonus, the Department further identified the titles that constitute such health care support workers, which resulted in approximately 35 additional titles being added to the qualifying-employee list. (Exhibit A p 5.) If HHAs were meant to be included, at some point their title would have made the list. Auditor Epstein indicated that when he performed the audit herein, he disallowed the bonus recovery for HHAs simply because it is not listed “under that column, on the list of eligible titles.” (T 28-29.)

Additionally, the Department has, in an FAQ, explicitly determined to exclude HHAs from receiving the bonus because “**they will be eligible for increased minimum wage payments pursuant to PHL 3614-f.**” (HWB program FAQs [emphasis in original]). Auditor Epstein explained that the HWB program bonuses were not built for HHAs, “mainly, because they receive[d] a minimum wage increase” statewide instead of eligibility for the bonus. (T 25, 26, 27, 29, 32.) He conceded that he was not certain that the HHAs at issue herein received the minimum wage increase (T 27); however, in *Amber Court, supra* at p 13, the argument that Personal Care Workers, including HHAs, that did not receive the increased minimum wage payments pursuant to PHL § 3614-f should be entitled to the HWB was rejected “as the pertinent issue under the FAQs is that such aides are eligible for, not that they receive, increased wages in another form.” Although there is an annual salary cap of \$125,000 to receive the bonus and HHAs make less than that, the cap was put in place more “to ensure that somebody making over \$125,000 doesn’t get the bonus” (T 29), not to include all those who make less than \$125,000 annually.

The Appellant’s president, Mr. Tosetto, conceded that he read the FAQs. He employed 15 HHAs and paid them all the bonus “because they deserved it” even though they also received an increase in their minimum wage pay. (T 43.) He did not seek Medicaid reimbursement for 10 of the aides “because it was straightforward that they did not receive the bonus” but he thought he should be reimbursed for the bonuses he paid to the other five employee aides. He cited documentation he received as a provider from the Department which described worker eligibility as an employee who works “**under** an eligible worker title.” (T 44.) “To be front-line, such workers must provide or directly support the provision of health or care services to patients in certain settings and **under** one of the titles listed in the statute.” (Exhibit A p 4.)

The Appellant hired the five aides at issue during and after the COVID-19 pandemic as it

struggled to find and retain employees, especially HHAs. The Department approved “temporary aide certification” programs because it was so difficult to retain aides. (T 53.) The Appellant employed people who did not have the required training to be HHAs, arranged training for them with the local community college, and employed a nurse who taught them internally. At the completion of the three-and-a-half-week course, they were qualified as HHAs, the work title eventually listed in their HR files (T 48-49) after September 28, 2022 (Exhibit 3 pp 89-93). The Appellant contends that prior to September 28, 2022, the end of the second vesting period, the aides were working as temporary aides **under** the supervision of the nurse. “[W]e did this with these people, which I eventually sent to school to get their actual certification. I want to be absolutely honest. I have no idea whether that temporary aide is considered an aide and not [] part of the bonus [program].” (T 53.)

President Tosetto’s honesty is commendable. It is also commendable that the Appellant paid bonuses to all HHAs knowing that they were not entitled to the bonus and, therefore, that it would not be reimbursed by the Medicaid Program. (T 43.) However, the training the Appellant provided by the nurse was admittedly only three and a half weeks long (not long enough for vesting) and is not documented anywhere in response to the DAR. (Exhibit 3.) Additionally, Mr. Tosetto did not deny that the employees that were serving as temporary aides were performing the tasks of HHAs even though working under nurse supervision. *See Amber Court of Brooklyn ALP Decision p 16* (employees who perform personal care services are PCAs and therefore not entitled to HWB bonuses despite different assigned job titles). President Tosetto admitted that he did not know whether the temporary aides would qualify for the bonus, yet employers were required to determine employee eligibility for the HWB *before* paying bonuses and seeking reimbursement from the Department. SSL § 367-w(3)(c). The OMIG’s determination to disallow sample numbers

30, 31, 37, 38, 52, 53, 54, 100 and 101 because the employees, as HHAs, were ineligible for the HWB is sustained.

The OMIG also disallowed reimbursement for the bonuses paid to the Appellant's administrative staff: including sample numbers 13 and 14, where the actual employee title is **audit clerk**; sample numbers 25, 26, 94, and 95, where the actual employee title is **business office manager**; sample numbers 48 and 49, where the actual employee title is **human resource worker**; and sample numbers 69, 70, 88, and 89, where the actual employee title is **accountant**. The Appellant paid these employees the HWB because it believed that they should have been considered "other health care support workers" and therefore qualified to receive the bonus. (T 48.)

The Appellant's employees who acted in these roles each submitted the following attestation:

I received both portions of the Hero Bonus. From the very beginning of the COVID pandemic and the following two years we were extremely short staffed because many of our front line staff quit or were sick because of COVID. When this occurred my job duties expanded into being support staff for each department that needed help. As new directives came down through Dear Administrator letters and we could not find staff to achieve those directives our office staff took on those responsibilities.

I personally sanitized rooms and common areas. I delivered food to residents that were in isolation. I picked up garbage in resident rooms that were infected with COVID. I answered the nurse call to allow for the HHAs to spend the extra time in the showers. I wore personal protective equipment each and every day. This was every day that I worked for months at a time over two years.

(Exhibit C.) Two of the attestations were dated September 2; one September 3; and three on September 8, 2025, all approximately four months after the FAR. (Exhibit C.)

President Tosetto testified that he believed that what work somebody was performing at

the facility is what should have counted to determine whether they were an employee entitled to the HWB. (T 47.) The law provides that “all other healthcare support workers” are entitled to the bonus and “if somebody was giving hands on care, and that’s primarily what [my employees] were doing, and they were putting that effort into it, and then, they attested that they were doing so, I shouldn’t withhold the bonus. So when we submitted our forms for these bonuses for the staff, I included people under that job title, support service worker.” (T 48.) He said that if there was a mistake made it was that he did not change their job title in their human resource folders (T 58) but he relied on the directive of the Department that described “all other health care support workers” as “other workers that are similar to the titles listed in the statute, and that support the provision of health care services to patients in frontline settings for these titles.” (T 59; Exhibit A p 4.)

All the administrative staff at issue attested in writing to the exact same hands-on, front-line, patient-facing care (Exhibit C) although they all held different titles. None of the attestations included a specific time frame for when they performed the tasks they attested to. (Exhibit C.) Additionally, these attestations were not submitted during the audit or in response to the DAR. 18 NYCRR 517.5(b)&(c), 519.18(a). All the attestations were signed and notarized only after the FAR and not contemporaneously with the work performed. Employers who seek HWB reimbursement for claims are required to maintain and make available upon request all records, data and information relied upon in determining that an employee was eligible for the HWB (SSL § 367-w[3][c]); and to track the number of hours employees worked *during each vesting period* and submit reimbursement claims for HWB payments to the Department. SSL § 367-w(3)(b)(i).

SSL § 367-w(2)(a) sets forth a list of titles/roles which are included in the definition of employee for purposes of the worker bonus. None of the titles of audit clerk, business office

manager, human resource worker, or accountant are on that list. (T 66-67.) While the list is not exhaustive, nor does it identify any titles/roles that are specifically excluded, the Appellant did not submit sufficient documentation to establish that the audit clerk, business office manager, human resource worker and accountant were “forward-facing staff” providing “hands on health care services to individuals.” SSL § 367-w(2)(a). Additionally, the expanded eligibility for the HWB was not boundless and the FAQs identify a list of “all other health care support workers” who work in institutional medical settings that would qualify for the HWB. Audit clerks, business office managers, human resource workers, and accountants also are not on that list. (Exhibit A p 5.)

The administrative workers’ boiler plate attestations made in contemplation of this hearing were not timely and appropriately produced for this audit and do not meet regulatory requirements for eligibility. They are not sufficient to meet the Appellant’s burden of proof and its obligation to prepare and to maintain contemporaneous records demonstrating its right to payment of claims for bonuses paid during the vesting periods. 18 NYCRR 504.3, 517.5(b)&(c), 519.18(a); *see also Support-Link, Inc. NHTD Decision After Hearing* p 8 (Audit #24-4916, issued September 26, 2025, ALJ Kathleen Dix).

Auditor Epstein testified that although the Appellant indicated that the employee for samples 13 and 14 was a “healthcare support worker,” her actual title was “**audit clerk.**” (T 21-22.) Audit clerks are not eligible for the bonus because their title is not listed in the Social Services Law or FAQs as an eligible title. (T 22.) President Tosetto testified that the employee at issue was hired to assure that the staff was following regulations and for quality assurance purposes, including following directions regarding how and when to sanitize rooms. She was responsible for making sure that the housekeepers were going in the rooms and deep cleaning. The audit clerk additionally became a medical technician to assist medication distribution in the facility. (T 54-

56.) Although numerous clerks are listed in the FAQs as “other health care support workers” including 10 sub-categories of clerks, “audit clerks” are not included. (Exhibit A p 5.) Audit clerk is described on O*net Online as an administrative job that involves, among other things, operating computers, executing financial transactions and compiling data. Even though the audit clerk interacted with the housecleaners of the facility and learned to assist with medical distribution, she did not need to work on the front-line but rather directed and supervised those front-line workers. As such, she did not qualify as an employee entitled to the HWB.

For sample numbers 69, 70, 88, and 89, the actual employee title is **accountant**, which like an audit clerk, is an employee who prepares financial documents, reports or budgets and advises primarily on financial matters. Likewise, the employee title of **business office manager** associated with sample numbers 25, 26, 94, and 95, is described on O*Net Online to mean responsible for managing the office and office clerks, maintaining office equipment and conferring with subordinates. The boiler plate attestations of the Appellant’s accountant and business office manager that they also served in the same front-line capacity as every other administrative staff member are not persuasive as they were concocted for purposes of this hearing and were not given to the auditor during the audit, either before or after preparation of the DAR. The Appellant failed to meet its burden of documenting and proving that the accountant and business officer manager qualified as employees entitled to the HWB.

Finally, regarding sample numbers 48 and 49, the employee title at issue is **human resource worker**. Ms. Hund testified that she served in that role while employed by the Appellant. She testified that when she learned about the HWB, she attempted often to communicate with the Department as she had many questions about who should qualify as an “employee” entitled to the bonus. (T 62.) She claimed that the Department responded directing her to “use [her] best

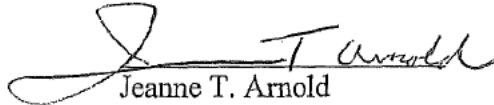
judgment” and advising that it was “better to put them on there and find out that they weren’t eligible than to not put them on there and find out that they were later on.” (T 62.) She reiterated that “it was all hands on deck” and that everybody “just jumped in wherever they could to help out, to make sure that our residents were taken care of during this time.” (T 63.) She explained that beginning with the first vesting period in October 2021, she was still unable to bring good employees in, and so she personally became a medical technician and “was eligible to pass medication.” (T 64.) She also delivered three daily meals to the residents and went to the rooms to clean and assisted with laundry. (T 64.) Ms. Hund conceded that she did not submit proof of the amount of time she spent doing such tasks, claiming the Department did not inform the Appellant that the hours had to “be broken down” and that she “had to keep separate records at that time.” She estimated that she “was probably spending about 30, 35 hours a week on [these tasks] because [she] wasn’t doing her regular job. . . [and] was more or less just jumping from department to department, helping out on the days [she] was working.” Ms. Hund also admitted that she did not communicate with the OMIG auditor about the time she spent doing any of the forward facing tasks she now asserts she performed until after the FAR (T 68) and only in contemplation of this hearing. (Exhibit C.)

Again, it is commendable that the Appellant’s employees in all capacities were operating post-COVID and working together to assure that the residents of the facility were being cared for, but the Appellant did not meet its burden of proving that its human resources director qualified as an employee entitled to the HWB.

DECISION

The OMIG's determination to recover payments from the Appellant for HWB payments made to ineligible employees was correct and is affirmed.

DATED: Rochester, New York
December 8, 2025


Jeanne T. Arnold
Administrative Law Judge

TO:

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SAPA File