

STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE
BUREAU OF SECURITIES REGULATION

_____))
IN THE MATTER OF:))
))
Local Government Center, Inc., *et al.*) Case No: C-2011000036
_____))

**RESPONDENT JOHN ANDREWS’ MOTION TO PRECLUDE
EXPERT TESTIMONY FROM MICHAEL A. COUTU REGARDING THE LGC
DEFINED BENEFIT PENSION PLAN**

Respondent John Andrews moves to preclude expert testimony from Michael A. Coutu regarding the LGC defined benefit pension plan, stating as follows:

Introduction

1. The Bureau of Securities Regulation (“BSR”) seeks to elicit a variety of expert opinions from Michael A. Coutu at the final hearing. One such opinion is that the LGC defined benefit pension plan “constitutes an unreasonable and avoidable obligation,” and that the plan “should be terminated as soon as it is practicable to do so.” See Exhibit A, Coutu Expert Report, Page 19.

2. Mr. Coutu should be precluded from offering this opinion for two reasons. First, Mr. Coutu’s opinion is unreliable because he has never reviewed the plan document; rather, he derives his entire understanding of the plan document from a secondary source that Mr. Coutu himself believes may be inaccurate. Second, Mr. Coutu lacks the expertise to offer an opinion with respect to the pension plan.

3. Because Mr. Coutu’s testimony regarding the pension plan is unreliable for the above reasons, it should be excluded from the final hearing.

Legal Standard

4. RSA Ch. 421-B sets forth the procedures that apply to the final hearing in this matter. *See* RSA 5-B:4-a, VI; RSA 421-B:26-a, I. RSA 421-B:2, VII-a defines “hearing” as “the receipt and consideration by the department of evidence . . . in accordance with these rules and applicable law, and includes: (a) Conducting trial-type evidentiary hearings[.]” In addition, while RSA Ch. 421-B does not require the presiding officer to strictly apply the rules of evidence, RSA 421-B:26-a, XX does provide that the evidence must be “relevant, material and reliable” in order to be admissible at the hearing. Accordingly, though administrative agencies are not strictly bound by the rules of evidence, *see* N.H. R. Evid. 1101(a), hearings under RSA Ch. 421-B must nonetheless be conducted in a “trial-type” manner, the essence of which is a rigorous and methodical analysis of whether particular evidence is “relevant, material, and reliable.”

5. The essential purpose of a hearing is to decide the merits of an allegation. This is done by finding facts, and then applying the law to the facts. Regardless of whether the fact-finder is a jury, a judge, or an administrative hearings examiner, unreliable evidence should not be admitted. There is no principled reason why an administrative agency should tolerate the expenditure of scarce resources on the presentation of unreliable evidence.

6. The burden is generally on the proponent of expert testimony to establish the qualifications of the expert to render the opinion and to establish that the opinion is relevant and reliable. *Cook v. CTC Communications Corp.*, 2007 WL 3028415, at *2 (D.N.H. 2007) (applying Fed. R. Ev. 702). Under generally accepted principles of law

related to reliability and expert testimony, Mr. Coutu's anticipated testimony regarding the LGC defined benefit pension plan is not admissible.

Argument

I. Mr. Coutu's opinion regarding the pension plan is unreliable because Mr. Coutu has not reviewed the plan document.

7. At his deposition, Mr. Coutu acknowledged that he has never reviewed the pension plan document. See Exhibit B, Coutu Deposition Transcript, Page 199, 213-14. Rather, Mr. Coutu derived all of his knowledge of the plan document from a brief description of the document that is contained in the Notes to Financial Statements prepared by LGC auditor Berry Dunn. *Id.* at Page 199-200.

8. Because Mr. Coutu has not reviewed the pension plan document, any opinion he holds regarding the plan is baseless, speculative, and thoroughly unreliable. The Presiding Officer should preclude Mr. Coutu from offering an opinion regarding a document he has not reviewed. *See, e.g., Noel v. Martin*, 21 Fed.Appx. 828, 836 2001 WL 1251662, at *7 (C.A.10. (Colo.)) (In legal malpractice case, district court well within its discretion to disqualify expert testimony as unreliable where expert opined that the introduction of certain evidence in underlying trial was outcome determinative, but expert did not read the trial transcript or review the evidence presented at the trial).

9. There is an additional layer of unreliability: Mr. Coutu not only has not read the plan document about which he intends to opine, but Mr. Coutu himself questions the reliability of the secondary source from which he derived his entire understanding of the pension plan. At his deposition, Mr. Coutu testified as follows:

Q: Your second conclusion is that the defined benefit plan constitutes an avoidable obligation. What does that mean?

A: Avoidable?

Q: Yeah.

A: In the notes to financial statements they clearly say, **and I have suspicions that it is correct**, it clearly says that the board of directors can amend, modify, alter, and terminate the plan at any time whatsoever. Therefore, it's voidable.

Q: You don't believe that's correct?

A: **I said I'm suspect.**

Q: Which tells me you don't believe that's correct.

A: Well, I haven't read the plan. We already established that. It sort of smells like an [E]RISA type qualifying plan, okay? Number two, the financial statement footnote says that it can be a voidable plan, **so certainly to me that raises the question that it may not be able to which means that the financial statement is wrong, the audited financial statement.**

Q: And if the audited financial statement is wrong on this point, then so is your conclusion, correct?

A: Yes. My conclusion was based again on the audited financial statement.

Exhibit B, Coutu Deposition Transcript, Page 208-09 (emphasis added).

10. Because Mr. Coutu did not read the plan document – and moreover, because even he doubts the accuracy of the only document upon which he relied in formulating his opinion about the pension plan – his testimony regarding the pension plan is inherently unreliable and should be excluded from the final hearing. *See Noel v. Martin*, 21 Fed.Appx. 828, 836 2001 WL 1251662, at *7 (C.A.10. (Colo.)).

III. Mr. Coutu lacks the expertise to opine on the pension plan.

11. The unreliability of Mr. Coutu's opinion regarding the pension plan is exacerbated by his lack of expertise on the topic of defined benefit pension plans generally. It is well established in New Hampshire that expert witnesses must possess expertise that is directly pertinent to the subject matter of the opinion; *i.e.*, the expert must be more than just generally qualified as a professional in her field. *See Bisset v. Renna*, 142 N.H. 788, 792 (1998) (pharmacologist not qualified to testify to the standard of care required of defendant ophthalmologist); *see Chase v. Mary Hitchcock Mem.*

Hosp., 140 N.H. 509, 512-13 (1995) (proffered expert's lack of experience and research with respect to particular medical procedure rendered him unqualified to testify regarding such procedure) (applying N.H.R.Ev. 702). The Presiding Officer should apply the same test to determine that Mr. Coutu lacks the requisite expertise on the topic of defined benefit pension plans such that his opinion is sufficiently reliable under RSA 421-B:26-a, XX.

12. Mr. Coutu is not an actuary, See Exhibit C, Coutu Curriculum Vitae, and has never studied actuarial sciences. Exhibit B, Coutu Deposition, Page 8. He lacks experience in creating, implementing, and administering pension plans. See Exhibit C, Coutu Curriculum Vitae. Rather, Mr. Coutu "had a 26-year career in property and casualty insurance." Exhibit A, Coutu Expert Report, Page 1.

13. According to Mr. Coutu, "[t]he plan should be terminated as soon as it is practicable to do so," Exhibit A, Coutu Expert Report, P. 19, but Mr. Coutu acknowledges that he does not know whether federal or state would permit the termination of the plan. *Id.*; see Exhibit B, Coutu Deposition Transcript, P. 211-213. Mr. Coutu acknowledged that he is not qualified to offer an opinion on that subject. Exhibit B, Coutu Deposition Transcript, P. 212-213.

14. Because Mr. Coutu lacks any expertise in creating, implementing, or administering pension plans of any kind, and because he lacks the expertise to opine whether his own recommendations regarding the plan are legally permissible, Mr. Coutu is not qualified to offer an expert opinion regarding the pension plan.

