

**STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE
BUREAU OF SECURITIES REGULATION**

IN THE MATTER OF:

Local Government Center, Inc., et al.

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) Case No: C-2011000036
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)

**RESPONDENTS' MEMORANDUM IN SUPPORT OF
ORAL MOTION FOR WITHDRAWAL OF PRESIDING OFFICER**

Respondents, by and through counsel, submit this memorandum in support of their oral motion for withdrawal of the Presiding Officer pursuant to Part I, Articles 15 and 35 of the New Hampshire Constitution, the Fourteenth Amendment to the United States Constitution, and RSA 421-B:26-a, XI.

INTRODUCTION

Late on the ninth day of a ten-day evidentiary hearing, Respondents learned for the first time, and contrary to information provided to them by the Presiding Officer months earlier, that the Presiding Officer's compensation for the proceeding is based on the duration of the matter. This compensation scheme gives the Presiding Officer a constitutionally-prohibited financial stake in the outcome. The compensation mechanism was arranged by the Secretary of State, a party to the proceeding, and the upper limit of the compensation was negotiated twice—including during the evidentiary hearing, after the Presiding Officer had denied the Respondents' dispositive motions. Consequently, Respondents have been denied their due process rights pursuant to Part I, Article 15 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution, and their right to a proceeding before an impartial quasi-

judicial officer pursuant to Part I, Article 35 of the New Hampshire Constitution and RSA 421-B:26-a, XI.

Respondents seek withdrawal of the Presiding Officer.

SUMMARY OF PROCEDURAL BACKGROUND

This is an administrative proceeding to enforce RSA Ch. 5-B and RSA Ch. 421-B. The Bureau of Securities Regulation (“BSR”) commenced this proceeding by filing a Staff Petition on September 2, 2011. An administrative hearing was held daily from April 30, 2012, to May 11, 2012.

Respondents move for withdrawal of the Presiding Officer. Information revealing that the Presiding Officer had a pecuniary interest, of a type different in nature and substance than initially disclosed, was first provided to Respondents by the Presiding Officer on the afternoon of May 10 and the morning of May 11.¹ Based upon this information, a Right to Know Request was submitted to the Secretary of State’s Office on May 11, and a response was received on May 23, in which further information regarding the Presiding Officer’s pecuniary interest was revealed. *See* Right to Know Request, attached as Ex. A; Response of the Secretary of State, attached as Ex. B.

Pursuant to RSA 421-B:26-a, XI, Part I, Articles 15 and 35 of the New Hampshire Constitution, and the Fourteenth Amendment to the United States Constitution, Respondents made an oral motion for withdrawal of the Presiding Officer at their first possible opportunity (May 11) after learning that the Presiding Officer was engaged in contract negotiations with the

¹ In a conversation with counsel for the BSR and several of Respondents’ counsel following testimony on May 10, the Presiding Officer stated that due to the length of the hearing, it was necessary for him to “renegotiate” his contract with the Secretary of State.

Secretary of State during the pendency of the hearing. With additional information now disclosed, Respondents file this supplemental written memorandum in support of the motion.

Respondents do not make this motion lightly. The existence of a pecuniary interest in the proceeding on the part of the Presiding Officer and the appearance of impropriety, however, have already severely harmed, and pose a future risk of harming, Respondents' rights to a fair proceeding and an impartial factfinder.

As discussed in more detail below, without oversight or public review, the Secretary of State selected the forum of adjudication, personally and unilaterally appointed the Presiding Officer to resolve the dispute, negotiated the terms of payment during the discovery and motion stages of the case, and then during the pendency of the hearing had a "renegotiation" discussion with the Presiding Officer regarding the extension of his contract. At the time, the Secretary of State was in direct communication with counsel for the BSR concerning the prosecution of this matter. The appointment of the Presiding Officer and his payment, as structured by the Secretary of State, does violence to the spirit and intent of Part I, Article 35 of the New Hampshire Constitution, RSA 421-B:26-a, XI, and state and federal due process protections.

FACTUAL BACKGROUND

On September 2, 2011, the Secretary of State signed an order commencing an adjudicative proceeding against Local Government Center, Inc., and associated entities (hereinafter "LGC"), as well as individuals Maura Carroll and Peter Curro.² The proceeding concerns the operations of LGC's pooled risk management programs, which provide health benefits for 75,000 local government employees and their dependents, among other services deemed "essential to the proper functioning of political subdivisions" by the enabling legislation.

² Other Respondents were also named in the initial Staff Petition, but were subsequently dismissed after motions were filed by the BSR.

In light of the significant public interest in the matter, LGC sought assurances that a neutral, impartial hearing officer would be appointed, and suggested using a retired judge or justice. LGC also offered to pay one-half of the cost for such an officer. The Secretary of State rejected the offer, claiming it would be too expensive, and instead appointed Donald E. Mitchell of Sandwich, New Hampshire, as Presiding Officer. Mr. Mitchell was formerly executive director of the Public Employees Labor Relations Board.

On October 4, 2011, an initial conference was held before the Presiding Officer. At that conference, counsel for LGC inquired of the Presiding Officer as to the nature of his position and how he was being compensated. The Presiding Officer indicated that he was being compensated on a fixed or flat fee basis. *See* Transcript of Administrative Hearing, Day 10 (May 11, 2012), at 2306:12-2307:2, 2311:14-17, 2313:18-22 (hereinafter “Tr.”). “Fixed fee” or “flat fee” is a concept well-understood by attorneys and laypeople alike, to mean a single, set amount of money charged to cover all work to be undertaken on a particular matter from start to finish, regardless of the amount of time actually expended, the length of the engagement, or the outcome of the matter. *See* Black’s Law Dictionary (9th ed. 2009) (defining “fixed fee,” under “fee,” as “[a] flat charge for a service; a charge that does not vary with the amount of time or effort required to complete the service.”). Consistent with that universal understanding, counsel for Respondents believed that the duration of the contract—or the length or amount of time actually worked by the Presiding Officer—was immaterial with regard to the amount of compensation the Presiding Officer would receive. In fact, as Respondents first discovered seven months later as the hearing drew to a close, this was not the case.

The Presiding Officer held several motion hearings and “informal conferences” through the fall of 2011 and winter of 2011-12 as the case progressed towards a trial-type hearing. At no

point were counsel informed that the Presiding Officer would in fact be paid on a semi-monthly basis for as long as the proceedings lasted. *See* Tr. 2306:12-2307:2, 2311:7-17, 2313:18-22.

Throughout this time period, the Secretary of State continued to be involved in the prosecution of this matter and was in direct communication with counsel for the BSR.

On March 12, 2012, Respondents filed dispositive motions. On April 4, 2012, the Presiding Officer denied the motions in virtually all respects. At the time, unbeknownst to Respondents' counsel, the Presiding Officer's compensation was directly linked to the duration of the proceeding.

On April 30, 2012, the Administrative Hearing began. Respondents moved for judgment as a matter of law at the close of the BSR's case, on May 4, 2012. Respondent Peter Curro renewed his motion on May 9, and all Respondents renewed their motions on May 11, 2012, at the close of the evidence. These motions were denied. On each of these dates, the Presiding Officer's compensation was directly linked to the duration of the proceeding.

On or about Wednesday, May 9, the Presiding Officer discussed informally with counsel an appropriate date for submission of post-trial briefing. Counsel suggested a due date of June 4, with further responses due June 7. On Thursday, May 10, following the day's testimony, informal conversations again took place regarding the submission of post-trial briefing, and in an aside, the Presiding Officer mentioned that he was renegotiating his contract with the Secretary of State, because his current contract ended at the end of May.

This discussion was the first time Respondents' counsel learned that the Presiding Officer was negotiating an extension of his contract with the Secretary of State, the prosecuting authority in this matter, even as the Presiding Officer was presiding over the trial phase of the

administrative hearing. This was also the first time counsel for the Respondents learned that the Presiding Officer was not being compensated on a flat fee basis at all.

Upon returning to the hearing room on the morning of Friday, May 11, Respondents' counsel initially approached the Presiding Officer and informed him, in the presence of opposing counsel but off the record, that they believed his withdrawal was required pursuant to RSA 421-B:26-a, XI, and Part I, Article 35 of the New Hampshire Constitution, as well as the due process clauses of the state and federal constitutions. They explained that his contractual relations and negotiation with the Secretary of State gave him an unconstitutional pecuniary interest in the matter.

During the bench conference, Respondents also inquired regarding the Presiding Officer's compensation arrangement. They were informed for the first time that the Presiding Officer was being compensated at a rate of \$5,000 per half-month of work performed, plus mileage, rather than on a flat fee basis. Respondents had never before been informed that the Presiding Officer's compensation was contingent on the duration of the matter, and indeed had been explicitly told otherwise.

Respondents then moved orally for the withdrawal of the Presiding Officer. That motion was denied. In denying the motion on the record, the Presiding Officer confirmed that he had indicated to counsel at the very first meeting that he was being paid on a "flat basis." Tr. 2313:12-22. The Presiding Officer also stated that he had rejected the Secretary of State's request that he perform his services for free, because he was "not a person of significant wealth." Tr. 2314:20-2315:2. The Presiding Officer further admitted that had suggested to the Secretary of State that his contract provide for payment "in increments," apparently based on the length of the proceedings. Tr. 2314:6-13. He also confirmed that based upon the recent discussions with

counsel regarding the briefing schedule and a “recognition . . . of what it would take to come to a decision in this matter,” he had spoken with the Secretary of State on the previous day to renegotiate an extension of his contract, telling him that “this is going to go longer now than – than May 31st, and so I think we have to extend my contract a month to June or whatever.” Tr. 2315:14-2316:3.

On May 11, 2012, following the conclusion of the hearing, Respondents submitted a Right to Know Request to the Secretary of State. Ex. A. On May 23, Respondents received a response to their Right to Know Request. Ex. B. The responsive documents included a contract between the Secretary of State and the Presiding Officer, executed August 24, 2011. *See* Ex. B at SOS-1 to SOS-7. This contract provided for a price limitation of \$30,000, a completion date of November 30, 2011, and that the Contractor would “submit invoices to the Department of State on a semi-monthly basis **for services rendered.**” *See id.* at SOS-1, SOS-6 (emphasis added). An amendment to the contract, dated November 14, 2011, changed the price limitation to \$90,000 and the completion date to May 30, 2011.³ *See id.* at SOS-8. Invoices for “personal services rendered” have been submitted every half-month in the amount of \$5,000.00. *See id.* at SOS-23 to SOS-39.

The responsive documents also include email communications, including one in which the Presiding Officer offered “with full appreciation for the opportunity to have served the state in the past . . . to reduce my per diem fee to the state” *See id.* at SOS-16. The contract itself provided that the Presiding Officer’s compensation “shall be equivalent to what he received immediately prior to retirement from state service.” *See id.* at SOS-6. The Presiding Officer’s salary earned from the state as Executive Director for the Public Employee Labor Relations

³ Presumably, this is a typographical error, and the parties’ intent was to extend the contract through May 30, 2012.

Board in calendar year 2009, the year before he retired, was \$89,775.75. *See* State Employee Pay Search, Donald Mitchell, 2009, <http://www4.egov.nh.gov/paytransparency/paytransparencyssearch.aspx> (search “Calendar Year” for “2009,” first name “Donald,” last name “Mitchell”).⁴

ARGUMENT

A. The State and Federal Constitutions, and New Hampshire Law, Require that all Judicial and Quasi-Judicial Determinations Be Made by an Impartial Officer

Consistent with our long and proud tradition of fairness in adjudicatory matters, the New Hampshire Constitution recognizes the signal importance of impartiality in the administration of justice:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit.

New Hampshire Constitution, Part I, Article 35. The requirement of impartiality applies not only to trial judges but also to administrative officials “acting in a quasi-judicial capacity.”⁵ *In re Town of Bethlehem*, 154 N.H. 314, 330 (2006). The state and federal constitutions also require that due process of law be maintained. *See* United States Constitution, Am. XIV (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law[.]”); New Hampshire Constitution, Part I, Article 15 (“No subject shall be . . . deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his . . . estate, but by the judgment of his peers, or the law of the land.”).

⁴ A salary of \$89,775.75 produces monthly income of approximately \$7,481.31. The \$10,000 a month payment exceeds the Presiding Officer’s 2009 state salary by 34%.

⁵ “An act is judicial in nature if officials are bound to notify, and hear the parties, and can only decide after weighing and considering such evidence and arguments as the parties choose to lay before them.” *Town of Bethlehem*, 154 N.H. at 330 (quoting *Appeal of City of Keene*, 141 N.H. 797, 800 (1997)). The present administrative proceeding undoubtedly involves acts that are “judicial in nature.”

Consistent with the constitutional mandates for impartiality and due process, the statute governing these proceedings provides that:

Each presiding officer may, at any stage of the hearing process, withdraw from a case . . . for any other reason that may interfere with the presiding officer's ability to remain impartial.

RSA 421-B:26-a, XI. In this matter, the appearance of impartiality is of equal if not greater importance to the existence of impartiality. This case involves public entities and issues directly affecting tens of thousands of public employees. Accordingly, consistent with the rights guaranteed by the New Hampshire Constitution, a Presiding Officer should withdraw from a hearing once there is a basis to conclude that he may not be impartial.

B. Compensating an Ad Hoc Presiding Officer Based on the Duration of Work Performed Violates Due Process by Compromising the Impartiality of the Presiding Officer.

The New Hampshire Supreme Court has long held that when a judicial or quasi-judicial officer has pecuniary interests in a case, disqualification is required. Although not all forms of bias result in automatic disqualification, pecuniary interests are different. Indeed, “[a] *per se* rule of disqualification due to the probability of unfairness, applies when the trier has pecuniary interests in the outcome.” *Appeal of Grimm*, 141 N.H. 719, 721 (1997) (quoting *Plaistow Bank & Trust Co. v. Webster*, 121 N.H. 751, 754 (1981)); *see also Hass v. County of San Bernardino*, 45 P.3d 280, 286 (2002) (“Of all the types of bias that can affect adjudication, pecuniary interest has long received the most unequivocal condemnation and the least forgiving scrutiny.”).

Pecuniary interests warranting close scrutiny are not limited to pre-existing interests in the outcome of a case, such as when the adjudicator has an ownership interest in a corporate party on one side of the case. Rather, it is well-settled that having an adjudicatory officer's compensation depend on the duration, amount, or kind of work performed itself gives the officer

an impermissible financial interest in the case. The Supreme Court of the United States long ago set out the test to be applied in such circumstances:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.

Tumey v. Ohio, 273 U.S. 510, 532 (1927). In *Tumey*, the U.S. Supreme Court concluded that Ohio statutes that permitted a village mayor to try violations of the Prohibition Acts and to receive, in addition to his regular salary, the amount of costs in each case following a conviction, created an impermissible pecuniary interest on the part of the mayor, in violation of the Due Process Clause of the Fourteenth Amendment.

As numerous post-*Tumey* cases expounding upon this test have explained, a court's analysis as to whether there is an impermissible pecuniary interest turns on the method of compensation itself and how it would affect a rational person in the position of the adjudicatory officer, not on whether there is evidence of partiality on the part of any particular adjudicatory officer. See, e.g., *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61 (1972) (holding that statutory provision providing for "disqualification of interested, biased, or prejudiced judges" was not a "sufficient safeguard to protect" a petitioner's rights, because requiring a petitioner to "show special prejudice in his particular case . . . requires too much and protects too little"); *Brown v. Vance*, 637 F.2d 272, 282 (5th Cir. Jan. 1981) ("We need find no instance of actual judicial bias to hold the fee system constitutionally infirm. *Tumey* and *Ward* do not require proof of actual judicial prejudice or of a direct pecuniary interest in the outcome of particular cases.").

Following on *Tumey*, the practice of appointing ad hoc administrative hearing officers was carefully examined by the California Supreme Court in *Hass v. County of San Bernardino*, 45 P.3d 280, 283 (2002), and was found to violate due process. The court held that "the practice

of selecting temporary administrative hearing officers on an ad hoc basis and paying them according to the duration or amount of work performed” gave hearing officers an impermissible pecuniary interest in the cases before them, thus interfering with their ability to remain impartial and violating due process rights. *Id.* The facts of *Hass* are materially indistinguishable from the facts of the instant matter, and illustrate why withdrawal is required here. For example, in *Hass*:

- The hearing officer “had not previously served as a hearing officer and had been hired to hear only the matter at hand.”⁶
- The hearing officer had been hired by the Deputy County Counsel, where the County was the administrative agency bringing the case.
- The hearing officer was “only paid for the work she actually performs . . . in connection with this hearing.”

Id. at 283-84. The *Hass* court summarized its ruling as follows:

The question presented is whether a temporary administrative hearing officer has a pecuniary interest requiring disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer’s income from future adjudicative work depends entirely on the government’s goodwill. We conclude the answer is yes.

Id. at 285. The court analyzed the principles governing pecuniary interests thusly:

[D]ue process requires fair adjudicators in courts and administrative tribunals alike. While the rules governing the disqualification of administrative hearing officers are in some respects more flexible than those governing judges, the rules are not more flexible on the subject of financial interest. Applying those rules, courts have consistently recognized that a judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge’s income from judging depends on the number of cases handled. No persuasive reason exists to treat administrative hearing officers differently.

Id. at 285-86.

Judges “whose compensation depends on the result of adjudication” are one of the “paradigmatic examples of adjudicators with pecuniary interests in the outcome,” according to

⁶ We assume, but do not know, that this is the first appointment of the Presiding Officer to adjudicate matters by the Secretary of State.

the *Hass* court. *Id.* at 287. One “example of outcome-dependent compensation” is the “fee system cases” in which magistrates were compensated “according to the number of cases they decided.” *Id.* at 288. In the fee system cases, compensation was not dependent on the disposition of the case, but merely on the volume. Nevertheless, the system was condemned as unconstitutional, even absent any “proof of actual judicial prejudice or of a direct pecuniary interest in the outcome of particular cases,” *id.* at 288, because prosecutors who are free to select their adjudicator will be “presumed to favor [their] own rational self-interest by preferring those who tend to issue favorable rulings,” and the adjudicators, in turn, will “have a ‘possible temptation . . . not to hold the balance nice, clear and true,’” *id.* at 288-89.

C. The Method of Compensating the Presiding Officer in this Case Has Violated, and Will Continue to Violate, Respondents’ Due Process Rights, by Compromising the Impartiality of the Presiding Officer.

The fears that were merely hypothesized in *Hass* have in fact materialized in this case. The Presiding Officer is compensated at a rate of \$10,000 per month for hearing a single case, and the Presiding Officer stated on the record that he would be paid “in increments” based on how long the proceeding continued. The fact that the arrangement is based on the duration of services rendered rather than a flat fee arrangement is confirmed by the contract, which requires that the Presiding Officer “submit invoices to the Department of State on a semi-monthly basis for services rendered,” and such invoices have been submitted every half-month in the amount of \$5,000.00, plus mileage. Ex. B at SOS-6, SOS-23 to SOS-39. In addition, the proceeding has continued through one, and by May 31, potentially two contract extensions. The contract’s “Price Limitation” has been raised and its Completion Date extended.

Moreover, the Presiding Officer himself explained on the record that he was “not a person of significant wealth,” and could not be the Presiding Officer “for free.” These words

demonstrate the financial interest of the Presiding Officer in the continuation of this hearing.⁷ His compensation to preside over this hearing, at the rate of \$5,000 on a semi-monthly basis for services rendered in this case, exceeds the full-time salary of both the Governor and the Secretary of State, and approaches that of a Superior Court Judge. On an annualized basis, it also exceeds by 34% the \$89,775.75 salary that the Presiding Officer earned from the state as Executive Director and Presiding Officer of the Public Employee Labor Relations Board in calendar year 2009, the year before he retired in 2010, despite the contract's requirement that "Contractor's compensation shall be equivalent to what he received immediately prior to retirement from State service."⁸ This compensation is more than enough to "offer a possible temptation to the average man . . . not to hold the balance nice, clear, and true." *Tumey*, 273 U.S. at 532. As the contract's "Price Limitation" has been raised, the Presiding Officer has had every incentive to continue the case through the end of the contract period, at which time a further extension could be (and was) requested. Irrespective of the integrity or motives of this particular Presiding Officer, the Presiding Officer has had, and continues to have, a financial incentive to

⁷ The explicit contract between the Secretary of State and the Presiding Officer apparently covers only the matter involving LGC and the related individual Respondents. However, the Presiding Officer's most recent work experience, which is most relevant to his prospects for future employment, is serving as an administrative hearings officer for the state of New Hampshire. In addition to the inherent economic incentive to obtain future work, especially on the lucrative terms of the instant contract, the Presiding Officer's statement that he was unable to preside over the hearing "for free" suggests that he is amenable to future work—presumably from the state as an administrative hearings officer. The Presiding Officer himself initially appeared to recognize the relationship of this contract to prior—and, implicitly, future—state employment when he offered "with full appreciation for the opportunity to have served the state in the past . . . to reduce my per diem fee to the state . . ." *See* Ex. B at SOS-16.

Finally, it is important to note that because the Presiding Officer was paid out of the Investor Education Fund, a fund controlled by the Secretary of State, the contract here did not go through the approval process with the Governor and Executive Council, as typically must take place with state contracts. *See* 421-B:26, IV. Accordingly, future employment as an administrative hearing officer for the Secretary of State's Office will turn *entirely on the discretion of the Secretary of State*.

⁸ Even if the Presiding Officer's salary was increased somewhat in his final year of employment, it was still considerably less than the compensation he has received as Presiding Officer. *Cf.* RSA 94:1-a (setting compensation for state officers).

rule against Respondents so that these proceedings would continue and so that his prospects of future employment would be heightened. This direct pecuniary interest in his decision-making requires his withdrawal. *See generally Hass*, 45 P.3d 280.⁹

For example, on March 12, 2012, Respondents filed dispositive motions. Had these motions been granted, the case would have ended, and the hearing officer's compensation would presumably have ended too. However, on April 4, 2012, the Presiding Officer denied the motions in virtually all respects, thus ensuring that the process would continue for several more semi-monthly periods during which he could invoice the Secretary for services rendered.

On April 30, 2012, the Administrative Hearing began. Respondents moved for judgment as a matter of law at the close of the BSR's case, on May 4, 2012. Respondent Peter Curro renewed his motion on May 9, and all Respondents renewed their motions on May 11, 2012, at the close of the evidence. Every one of these motions was denied by the Presiding Officer. Their denial ensured that this Administrative Hearing would, again, continue for a number of semi-monthly periods during which the Presiding Officer could invoice for services rendered.

Going forward, should the Presiding Officer find against Respondents in whole or in part, Respondents will undoubtedly wish to appeal. The statute requires that they first file a motion for reconsideration, also known as a petition for rehearing, before the Presiding Officer. *See* RSA 421-B:26-a, XXVI; RSA 541:4. A finding against the Respondents will thus ensure that

⁹ The BSR may seek to distinguish *Hass*—the most closely analogous prior case to the facts here—on the grounds that in *Hass*, the court discussed the hearing officer's prospect of future employment as a relevant fact that incentivized her to stay in the good graces of the County so she could get future work, *see* 45 P.3d at 289, while here there was no such express arrangement. Under the facts as found by the *Hass* court, however, the Hearing Officer denied any express discussions over whether she would be employed in the future, *see* 45 P.3d at 284, and accordingly the case cannot be said to have turned on any promise of definitive future employment as opposed to its mere possibility. Moreover, as discussed in footnote 10, *supra*, in the instant case the Presiding Officer offered to reduce his fee in part on the basis that he had served the state in the past, suggesting that here, too, at least in his view, this engagement was potentially one in a line of past and future state engagements.

the Administrative Hearing will continue through the time necessary for such a motion to be filed, considered, and ruled upon.

D. The Existence of Ongoing Negotiations Between the Secretary of State and the Presiding Officer During the Course of the Hearing Further Exacerbates the Due Process Violation.

The existence of ongoing negotiations between the Secretary of State and the Presiding Officer during the course of the hearing is a violation of Respondents' federal and state constitutional rights to due process and to an impartial factfinder. Although the Presiding Officer is appointed by the Secretary of State, it is undisputed that the Secretary of State has not played a neutral role in these proceedings. Instead, outside counsel for the BSR and the BSR attorney who brought this case were in frequent communication with the Secretary of State regarding the merits and substance of this matter, and the Secretary of State acted as the client/decision-maker with regard to the prosecution of this matter. Because the Secretary of State was involved in the prosecution, the Secretary of State must be deemed the prosecuting authority for purposes of considering the appropriateness of ex parte communications and negotiations between the Presiding Officer and the Secretary of State.

On the record, the Hearing Officer confirmed that after speaking with counsel regarding the briefing schedule, he had contacted the Secretary of State "yesterday" (i.e., Thursday, May 10) to renegotiate his contract, explaining "Mr. Secretary, this is going to go longer now than – than May 31st, and so I think we have to extend my contract a month to June or whatever"

Tr. 2315:14-2316:3.

Conducting a contract re-negotiation between the Presiding Officer and the prosecuting authority during the pendency of the proceedings, and particularly during the contested hearing phase as the Presiding Officer was hearing the evidence, provided the Presiding Officer with a

substantial, actual pecuniary interest in the case.¹⁰ Withdrawal is therefore required. *See Appeal of Grimm*, 141 N.H. at 721 (“A *per se* rule of disqualification due to the probability of unfairness, applies when the trier has pecuniary interests in the outcome.” (quoting *Plaistow Bank & Trust Co.*, 121 N.H. at 754)).

CONCLUSION

For the foregoing reasons, and based upon the oral argument presented to the Presiding Officer on May 11, 2012, the Presiding Officer should withdraw from this case.

¹⁰ The acknowledgement of this negotiation also revealed, problematically, that even before Respondents presented their final witness, the Presiding Officer had already determined that he would not be granting Respondents’ dispositive motions at the conclusion of the hearing.

Dated: May 30, 2012

Respectfully submitted,

LOCAL GOVERNMENT CENTER, INC.;
LOCAL GOVERNMENT CENTER
REAL ESTATE, INC.;
LOCAL GOVERNMENT CENTER
HEALTHTRUST, LLC;
LOCAL GOVERNMENT CENTER
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LLC;
HEALTHTRUST, INC.;
NEW HAMPSHIRE MUNICIPAL
ASSOCIATION PROPERTYLIABILITY
TRUST, INC.;
LGC-HT, LLC; AND
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CERTIFICATE OF SERVICE

I hereby certify that I have, this 30th day of May 2012, delivered two hard copies of this pleading to the Office of the Secretary of State, and forwarded copies of this pleading *via* E-mail to the Presiding Officer's service address and to counsel of record.

 /s/ William C. Saturley