

STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE
BUREAU OF SECURITIES REGULATION

IN THE MATTER OF:)
)
)
Local Government Center, Inc.;)
Government Center Real Estate, Inc.;)
Local Government Center Health Trust, LLC;)
Local Government Center Property-Liability Trust,)
 LLC;)
Health Trust, Inc.;)
New Hampshire Municipal Association Property-Liability) Case No.: 2011000036
 Trust, Inc.:)
LGC – HT, LLC)
Local Government Center Workers’ Compensation)
 Trust, LLC;)
And the following individuals:)
Maura Carroll; Keith R. Burke; Stephen A. Moltenbrey;)
Paul G. Beecher; Robert A. Berry; Roderick MacDonald;)
Peter J. Curro; April D. Whittaker; Timothy J. Ruehr;)
Julia A. Griffin; and John Andrews)
)
RESPONDENTS)

ORDER ON BSR REQUEST FOR ON-SITE EXAMINATION

BACKGROUND

On November 21, 2011 in Concord, New Hampshire a hearing was conducted on the several pending motions and responses thereto filed by the respective parties to this enforcement action. The underlying matter arises from a staff petition submitted by the Bureau of Securities Regulation (“BSR”) alleging that the named respondents, as appear in the caption above, undertook a series of acts resulting in violation of RSA 5-B, “Pooled Risk Management

Programs” and RSA 421-B, “Securities”. Pursuant to RSA 421-B:26-a,V a “Notice of Order” issued on September 2, 2011 by the secretary of state granting the BSR petition and informing the named respondents of their right to an administrative hearing.

The actions alleged in the BSR petition generally relate to the formation, organization and conduct of LGC, of several LGC related entities, of two individuals who have held the position of executive director of the LGC, namely respondents Carroll and Andrews, and several of its board members, past and present, in connection with the creation and operation of pooled risk management programs and of other LGC affiliates. For ease of reference hereafter, the LGC and its affiliates are collectively termed “LGC”. The actions alleged in the BSR petition also relate to the legality of certain expenditures by the LGC and the amounts of certain reserve funds, particularly funds contributed by municipalities and employees of municipalities to acquire health services and products. Among these health services and products were medical insurance coverage plans provided through agreements between the LGC and its affiliates and public employers referred to as “political subdivisions” in RSA 5-B:2,III. Additionally, the actions alleged in the BSR petition relate to the LGC acting in such a way as to be characterized as a “broker-dealer” or “issue-dealer”, as defined in RSA 421-B:2, involved in dealing securities

Among the several motions argued at the November 21, 2011 hearing was a BSR “Motion to Compel, Preserve and Enforce Subpoena.” In order to provide the parties with timely guidance in their case preparation and to best control and manage the pre-hearing procedures in this matter, this specific order addresses only partially the issues argued at hearing related to this BSR motion. A decision and orders addressing other aspects of the November 21, 2011 hearing will be forthcoming.

The issue here is whether the BSR can require an on-site examination to observe the financial operations utilized by LGC, the method and manner of producing documentation of transactions, and to review certain records as well as to interview personnel responsible for the financial management and processing of information related to the underlying allegations.

At the hearing before the undersigned presiding officer, parties were represented by counsel who had the opportunity to address this issue and undertake oral argument in support of their respective positions. Prior to the start of the hearing, Attorney Roy W. Tilsley, Jr. filed an appearance for BSR and participated in the subsequent hearing. Also, the LGC filed a response to the BSR's motion to compel, preserve and enforce subpoena prior to the start of the hearing.

Upon the request of BSR to submit a supplemental memorandum of law following the hearing and with due allowance given to the several respondents to respond to the supplemental memorandum submitted by the BSR, the record was held open until December 5, 2011. Following the review of all relevant filings regarding the issue and the content of oral arguments made, the undersigned presiding officer determines as follows:

FINDINGS OF FACTS

1. In or about 2009, the BSR exercised its statutory responsibility to regulate RSA 5-B, "Pooled Risk Management Programs" and began an investigation of the activities of LGC related to the provision of certain health and health related services and products to political subdivisions.
2. Its investigative activities caused it to submit a staff petition, pursuant to RSA 421-B:26-a, to the Secretary of State.

3. On September 2, 2011 the Secretary of State granted a staff petition submitted by the Bureau of Securities Regulation (“BSR”) and issued a “Notice of Order”, pursuant to RSA 421-B:26-a,V to the above captioned entities and individuals as well as two other individuals whose names have previously been withdrawn on request of the BSR without objection and are no longer parties in this matter.
4. The respondent LGC had retained counsel to represent it in the instant administrative proceedings and its counsel have appeared and actively participated in these proceedings.
5. Separate counsel representing the individuals who were named as respondents have also appeared to represent the rights of those individuals.¹
6. On September 13, 2011 the BSR issued a “Subpoena Duces Tecum” and subsequent communication and correspondence between it and the LGC ensued relating to the BSR request to conduct an on-site examination of financial processes and documents and to conduct interviews with certain individuals.
7. The subpoena referred to above contains a partial description of what is sought within a section entitled, “Scope of Investigation”, at Paragraph #13. It states:

“ Prior to requesting specific source documentation, allocations, etc. for review, we will need to obtain an understanding of the processes for the transactions listed above in order to determine and be assured that the pool for selection of such documentation is complete and can be traced

¹ N.B. Counsel representing the LGC and its other business or institutional entities also represents individual respondent Maura Carroll, presently the Executive Director of LGC. Former Director Andrews has retained separate counsel. Individual respondents Burke, Beecher, Berry, Curro, Griffin, Ruehr and Whittaker have retained shared counsel. Individual respondents Moltonbrey and MacDonald share separate counsel.

to the financial statement. This shall involve an understanding of your financial supporting software and IT involvement.”

8. The BSR subpoena did not contain language requesting an on-site examination, specify a location for the prospective subjects to report with the requested documents; nor did the letter request dated 10/19/11 request an on-site examination at the premises of the LGC.
9. Through verbal exchange and oral argument LGC has been aware that an on-site examination was the method sought to be utilized by the BSR in the exercise of its authority under RSA 421-B since before the filing of the petition as evidenced by the LGC refusal, on or about September 1, 2011, to voluntarily cooperate with an on-site examination by the BSR. The individual respondents have also been sufficiently informed of the BSR request as evidenced by reference to the on-site examination in their motions, legal memoranda or oral arguments.
10. The LGC utilizes information technology in the conduct of its financial operations to record, manage, process and store financial data and information.
11. Continuing to the date of this order, the LGC has refused to voluntarily allow the BSR to conduct an on-site examination of the financial processes and documents cited in the BSR subpoena in the manner sought by the BSR.
12. On November 18, 2011 the BSR filed a motion which, among other things, requested that the LGC be ordered to allow an on-site “inspection and review including

interviews of LGC Entities(sic) staff as required by the subpoena dated 9/13/11 and request dated 10/19/11.”

13. On November 21, 2011 the LGC filed its objection that, among other things, argues that an on-site inspection is “unnecessary” and, “will disturb the LGC’s work environment and create a ‘circus-like’ atmosphere disruptive of LGC’s function and operations.”
14. The respondents object to the conduct of interviews outside the formal protocol of sworn deposition.
15. The BSR and LGC filed post-hearing supplemental legal memoranda also addressing the on-site inspection issue.
16. The BSR and LGC have exchanged substantial material in the form of records, reports and other documents prior to, and subsequent to, the issuance of the secretary of state’s notice on September 2, 2011. Some of this material provided by LGC may match that sought in the subpoena and will be more specifically addressed in subsequent orders.
17. The BSR conducts its operations at the State House and State House Annex in Concord, New Hampshire. The LGC conducts its operations at the Local Government Center at Triangle Park, also in Concord, New Hampshire.
18. The parties have attempted, without success, to reach an agreement that would reconcile their respective positions regarding the conduct of an on-site examination.

JURISDICTION

The secretary of state is responsible for and is granted the authority to conduct adjudicatory proceedings and hearings related to violations of RSA 5-B (the “Pooled Risk Management Programs” law and RSA 421-B (the “Securities” law). The secretary of state may delegate this responsibility to a presiding officer, and the authority and jurisdiction to conduct such proceedings is exclusive. (See RSA 5-B:4-a,I and RSA 421-B:26-a,I). The presiding officer has the authority to regulate and control the course of the administrative proceedings and dispose of procedural requests. (RSA 421-B:26-a, XIV).

SUMMARY

The parties have proceeded to a logjam in their discovery flow in the preparation of their respective cases. The BSR asserts statutory authority to support its request for an on-site examination of LGC financial operations and reporting, including observation and inspection of technological applications and interviews with LGC staff and management related to its allegations that LGC violated the pooled risk program management statute and the securities regulation statute. The LGC and the individuals personally named as respondents defend their objections to the conduct of an on-site examination and informal interviews with LGC staff and management on the basis that the BSR’s authority to conduct an on-site examination was replaced or terminated with the filing of the staff petition. They assert that with the initiation of the administrative process, the on-site examination of LGC financial operations and materials does not comport with the traditional forms of discovery in litigation. They assert that the conduct of informal interviews by the BSR would be untimely and disruptive to a formal discovery process. They also assert that their rights of due process are violated (1) by the BSR’s continuation of its investigation of the parties through pre-hearing discovery in an administrative

proceeding they initiated for violations of the same statutes, and, (2) violated in the event additional statutory violations are alleged following the on-site examination.

The presiding officer finds that there is sufficient statutory authority to allow the BSR to conduct an on-site examination of LGC's financial operations and obtain relevant documents or digital data, but that the BSR's statutory authority to conduct sworn interviews must be limited by procedural safeguards to protect the due process rights of the respondents.

DISCUSSION

This decision specifically addresses only those aspects of the BSR's motion and underlying subpoena addressing the authority of the BSR to conduct an on-site examination of the financial operations of the LGC and to interview certain individuals related to the LGC through employment, governance, or agency. The BSR has requested to undertake an on-site examination of the LGC's financial operation, records, reports, data, and other documents, including observing the functioning of related hardware, software, or other applied information technology in order to gain a full understanding of its financial system. The parties have discussed the BSR request and as of the date of this order the LGC has refused to voluntarily submit to the requested manner of conduct of the examination and of the conduct of interviews outside the formal deposition process.

The conduct of all administrative hearings in this matter are governed by the provisions of RSA 421-B:26-a. The provisions of RSA 541-A, the state's Administrative Procedures Act, do not apply. (RSA 421-B:26-a,I). RSA 421-B at § B:26-a,XIV(g),(h) and (j) gives authority to the presiding officer to cause depositions to be taken, regulate and control the course of the administrative hearing, and dispose of procedural requests at the request of the parties or on his own motion.

The respondents are alleged to have conducted operations and undertaken actions that violate provisions of RSA 5-B (“Pooled Risk Management Programs”) and provisions of RSA 421-B (“Securities”). The “pooled risk” statutory language grants the secretary of state, acting in this instance through the BSR, authority to request “additional information necessary to exercise regulatory or enforcement authority pursuant to, but not limited to, the hearings procedures under RSA 421-B:26-a over any pooled risk management program formed or affirmed in accordance with this chapter.” (See RSA 5-B:4). The secretary of state is also authorized to, “investigate and impose penalties for violations of [the pooled risk program management statute].” (RSA 5-B:4-a,I.(b)). Further, the statute provides that, “[f]or the purpose of any investigation, hearing, or proceeding... the secretary of state or any officer designated by him or her may...require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the secretary of state deems relevant or material to the inquiry.” (RSA 5-B:4-a,III). This grant of authority also provides that the secretary of state, “shall have all the powers specifically granted or reasonably implied in order to perform the substantive responsibilities imposed by this chapter.” (RSA 5-B:4-a,II.).

There is additional authority found in the “securities” statute related to the allegations against the LGC contained within the staff petition and specifically related to BSR’s authority to obtain information. This authority arises under the provisions of RSA 421-B:9 and applies in this matter because the LGC is alleged to have violated provisions of the “securities” statute acting in the capacity of a “broker-dealer” or “issuer-dealer” or both as those terms are defined in RSA 421-B:2,III and XII(a), respectively. As a broker-dealer or issuer-dealer, LGC is required to provide the secretary of state, again acting through the BSR, certain management and financial reports, including annual audited financial statements certified by an independent certified public accountant. Other authority is found in RSA 421-B:9 allowing audits or inspections by, again,

the BSR as a representative of the secretary of state. This provision of the statute allows inspections and audits to be “made at any time and without notice” (RSA 421-B:9,I); reserving to the BSR the “scope of the examination” (RSA 421-B:9,III); and granting the examiner the “power to administer oaths, and to examine under oath any individual as to any matter relevant to the affairs under examination or relevant to the examination.” (RSA 421-B:9,III (b)).

The LGC objects to the conduct of an on-site examination as requested by the BSR. It asserts that the authority to conduct the BSR’s requested on-site examination as may be permitted under the statutory provisions cited above is terminated by the initiation of “formal hearing proceedings.” It also objects to the conduct of the on-site inspection stating that it is “unnecessary” and that it would “disturb LGC’s work environment and create a ‘circus-like’ atmosphere disruptive to LGC’s function and operation.” Third it asserts that to allow BSR to undertake an on-site examination and informal interviews amounts to allowing it to continue its investigation while the administrative hearing process is being conducted amounting to a deprivation of due process. The respondent Andrews, joined by the other individuals named as respondents, also raises concerns of due process in the event an on-site examination with informal interviews is conducted by the BSR.

In this matter, the presiding officer has the authority to regulate and control the course of the administrative proceedings and dispose of procedural requests. (RSA 421-B:26-a, XIV). However, in applying the substantive law of the case words cannot be deleted nor added to the statutes “that the legislature did not see fit to include.” *North Country Env’tl. Servs. v. Town of Bethlehem*, 150 N.H. 606, 617 (2004). A review of the substantive law of RSA 421-B and RSA 5-B does not reveal any language that prohibits or limits the authority of the secretary of state, here, acting through the BSR, to conduct an on-site audit, examination or inspection. There is no

language that makes this authority contingent upon a specific stage of the administrative proceedings against the respondents. Further, RSA 421-B;9,I explicitly states that it can do so “at any time and without notice.” Lacking any statutory language to counter the express authority found in the language of RSA 421-B, the BSR is entitled to conduct an on-site examination. Similarly, there is authority within the same statute that assigns discretion to the presiding officer to manage these proceedings in a manner that will allow them to proceed and be completed. That discretion therefore allows consideration of procedures that will minimize disruption to the operation and function of LGC.

RSA 5-B does not contain the identical language relating to on-site examinations as does RSA 421-B. It does however grant the power to the secretary of state, here again acting through the BSR, to request the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the secretary of state deems relevant or material to the inquiry.” (RSA 5-B:4-a,III). This statute also provides that it, “shall have all the powers specifically granted or reasonably implied in order to perform the substantive responsibilities imposed by this chapter.” (RSA 5-B:4-a,II.). Among the substantive responsibilities imposed on those enforcing this statute are investigation and the imposition of penalties for violations. Violations of RSA 5-B include actions relating to “the agreements to provide pooling of self-insurance reserves, risks, claims and loses, and of administrative services and expenses associated with [these agreements]...” (RSA421-B:3,I)

None of the parties contest that the financial operations conducted by LGC are performed, transacted, managed and data stored using information technology. The production of hard copies of documents are themselves the products generated by the operation of information technology hardware and software on digitalized records. There is no language in the statute that

excludes digital records from being considered “records” as it is used in the statute. The secretary of state, here again acting through the BSR is specifically authorized to examine the financial operations and records (RSA 5-B:4-a,III). I find that “records” includes those in digitalized form.

As the legislature expressly enhanced this power by extending it to include powers “reasonably implied” it is believed by this presiding officer and therefore determined that in this modern era those implied powers include on-site examination where information technology is being utilized, including observation, manipulation and operation of the technology that holds the data and information requested. The information sought by the BSR exists in digital form within the LGC computer system, I find the power to examine the digitalized records utilized by the LGC related to the conduct of a pooled risk management program and the alleged violations of RSA 5-B to be a “reasonably implied power.”

Having found that there is statutory authority to support the on-site examination, I address the other objections made by the respondents that bear on the issue of the conduct of the on-site examination. These objections include assertions that (1) the on-site examination is “unnecessary; (2) it would “disturb LGC’s work environment and create a ‘circus-like’ atmosphere disruptive to LGC’s function and operation”; (3) it allows the BSR to continue its investigation while the proscribed administrative proceedings have already been initiated; (4) the other individuals named as parties also have an equal right to be present during the on-site examination and be able to hear any interview conducted, accompanied by their own financial consultant; and, (5) that the BSR should not be able to add, as a result of the on-site investigation, additional violations to those that are the subject of the present petition.

The first of these, regarding the necessity for the on-site examination, is partially addressed above with the recognition of the computer's role in present day financial management, processing, and digital formatting and storage. The respondent LGC is a substantial, multi-million dollar, complex entity conducting not only its core operations, but also those of several entities named as respondents in these proceedings. The ready availability of computer data, admittedly preserved by the LGC, existing in digital form and easily capable of being digitally copied for the BSR in an efficient format capable of equally efficient analysis by its obvious practicality presents the necessity. This is particularly so with the number of parties involved in this administrative proceeding and the facility of sharing information that modern technology provides. It would require unnecessary time, effort and expense to forego the available application of technology.

The second of these objections, regarding the extent of disruption that could be caused by an on-site inspection is more a matter of mechanics. It can be reasonably expected with the experienced counsel representing the parties in this action that cooperation in this examination could minimize any significant disruption to the function and operation of LGC. If such cooperation as to mutual guidelines cannot be achieved by counsel representing all respondents, additional orders of the presiding officer can be issued, if necessary, to address such matters as the dates for, and time of day or night during which, the examination would be conducted within, for instance, the next two weeks or the designation of a commissioner to monitor and oversee the conduct of the examination and any necessary technical interviews with LGC staff outside the formal deposition process. The costs of such a commissioner, should he or she be needed, would be assigned as additional expenses of these administrative proceedings

Objections # 3 and #5 are addressed together. Without restating the statutory authority supporting the conduct of the on-site examination as earlier in this decision, the presiding officer believes, and therefore finds that the respondents are entitled to due process protections throughout the course of these proceedings. All parties are entitled to due process in this administrative hearing. In short “due process” means that a party is entitled to fair notice and a fair hearing before an impartial tribunal. These objections address the possible prejudice respondents assert they would suffer in preparing their respective defenses if more issues are discovered as a result of the on-site examination and then alleged by the BSR to constitute additional violations that the respondents must answer. Objection # 5 addresses the timing of any such additional allegations.

Both concerns can be addressed with procedural safeguards within the authority of the presiding officer. Notwithstanding the earlier finding that BSR has statutory authority to conduct an on-site examination, in the event any additional violations are determined from that examination and petitioned for by the BSR due process would require that a separate staff petition would have to be made pursuant to the governing statute. (RSA 421-B:26-a,V). If that new petition resulted in the required “notice of order” to issue by the secretary of state against any or all of the respondents, a separate administrative proceeding would have to be convened on the new staff petition. (RSA421-B:26-a, IV(c)). To simply add violations without the evaluation of the secretary of state or without the full conduct of the required administrative proceeding would unfairly prejudice the respondents unless they could be granted fair notice and granted an additional amount of time to defend either the separate petition or to otherwise defend consolidated petitions.

The fourth objection raised in the context of the conduct of an on-site examination relates to the BSR request to conduct interviews with certain LGC related personnel. Again, there is statutory authority allowing the BSR to do so. RSA 421-B:9,III(b). And again, the administrative proceedings have begun and the presiding officer has the responsibility to insure that procedural measures are put in place to comport with due process for all parties. It states the obvious to say that to gain a sufficient understanding of how financial information and data were processed, manipulated, and stored using the LGC computer system, that at least some level of dialogue between those with the knowledge and those seeking the knowledge would be valuable to both sides. The BSR would more quickly grasp the rudimentary or ministerial information necessary to complete its examination. The respondents would not be plagued with seemingly unending requests to produce documents that prove in the end not to be relevant, but initially thought so because of the relative ignorance of the requesting party lacking an understanding of how the computerized financial system worked. Both parties who, it may be said, are supported by taxpaying citizens, would also save thousands of dollars in fees and costs by cooperating during the conduct of the on-site examination and the provision of records in digitalized form .

The respondents do not oppose the conduct of interviews by the BSR in this regard however they request that (1) they be done in the presence of all counsel including counsel appearing for the individuals named as respondents; (2) according to a schedule that avoids prejudice to the individual respondents; and (3) are stenographically recorded. The presiding officer has not prohibited the taking of any deposition in these proceedings to date and there is no reason depositions of persons responsible for or actually processing the financial operations of the LGC cannot be taken if requested in a timely manner. However, I do not believe and

therefore do not find that a certain amount of incidental discussion between the parties to facilitate the conduct of the on-site examination that includes the operation of the technology utilized in the LGC's financial operations is unreasonable, unnecessary or prejudicial. It follows that such incidental dialogue is not to transpire under oath administered by the BSR or at its direction. To impose the formality of sworn depositional testimony from the outset of the on-site examination through the computer familiarization and continuing through a computer run of data manipulation and processing would create the very disruptive effect and circus-like performance the respondent LGC would like to avoid particularly if counsel cannot agree to conduct the examination outside of normal business hours. Once the BSR has completed the on-site examination and have received the copies of the digitalized and printed records requested that are not otherwise subject to withholding by the respondent LGC, depositions can commence in a manner that would more likely result in a more orderly deposition inquiry and accurate record and allow these proceedings to continue and be completed. Again, if necessary, a commissioner can be designated to maintain the parameters of incidental, non-sworn, non-prejudicial dialogue.

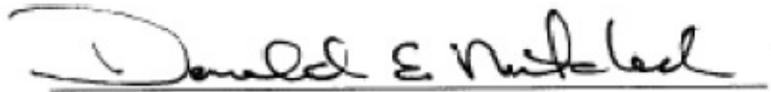
For the above stated reasons, I find that this approach to the conduct of an on-site examination by BSR is necessary to properly conduct and complete this case within the parameters of this administrative proceeding and comports with the provisions of RSA 421-B:26-a,IV(g),(h),(j) and (p).

I therefore order the following in furtherance of this decision:

- A. The BSR may conduct an on-site examination on the LGC premises comports with the decision above on or before December 31 or such other date as the parties may agree to mutually.

- B. All parties shall meet and confer on or before December 19, 2011 to reach mutual agreement upon the scheduling and logistics of the on-site examination.
- C. Any party who forms a good faith belief that it will be necessary for the presiding officer to appoint a commissioner to monitor and oversee the conduct of the on-site examination and any incidental discussion necessary to facilitate that conduct shall inform the presiding officer no later than December 19, 2011.
- D. As to attendance during the on-site examination, each party may be physically represented by one attorney and one financial consultant or other person and they shall be provided proximity and access to any dialogue between representatives undertaken during the on-site examination.
- E. The parties' counsel are not to interfere or disrupt dialogue among the financial representatives, or intervene with interrogatories more suitably reserved for formal deposition or otherwise subject them to protracted inquiry during the on-site examination.
- F. The related production of documents requested in the BSR subpoena dated 9/13/11 not yet produced by LGC or otherwise properly withheld for cause shall be provided to the BSR and may also be provided to other counsel of record upon request.
- G. The BSR shall not undertake self initiated sworn "interviews" at this stage of these proceedings of any individual named as a respondent nor other LGC board members during or after the on-site examination. Oral testimony may, of course, be obtained through properly scheduled deposition or examination at the hearing.
- H. In the event it becomes necessary for the presiding officer to designate a commissioner to monitor and oversee the on-site examination, any fees and expenses shall be assigned as a cost of these proceedings.

So ordered, this 14th day of December, 2011

A handwritten signature in black ink, reading "Donald E. Mitchell", written over a horizontal line.

Donald E. Mitchell, Esq.
Presiding Officer
Bar #1773

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