

STATE OF NEW HAMPSHIRE

DEPARTMENT OF STATE

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.: C-2011000036
 Trust, Inc.:)
 LGC – HT, LLC)
 Local Government Center Workers’ Compensation)
 Trust, LLC;)
 And the following individuals:)
 Maura Carroll; Keith R. Burke; Paul G. Beecher;)
 Peter J. Curro; April D. Whittaker; Timothy J. Ruehr;)
 Julia A. Griffin; and John Andrews)
)
 RESPONDENTS)
)

ORDER GRANTING DEPOSITION OF WITNESS WITH LIMITATIONS AND ISSUANCE OF SUBPOENA DUCES TECUM

BACKGROUND

On or about December 22, 2011, counsel for the LGC, Inc., its related entities and Maura Carroll (collectively “LGC”) issued a *Subpoena Duces Tecum to Testify at a Deposition and to Produce Documents* to David Lang as President of the Professional Fire Fighters of New Hampshire (“PFFNH”) that was accepted by agreement by PFFNH counsel. On January 3, 2012 PFFNH filed a “Motion to Quash the *Subpoena Duces Tecum*” asserting, among other things,

that the LGC, as a party to these proceedings, had no authority to issue the subpoena. On January 10, 2012 the BSR filed a “Motion in Support of [PFFNH] Motion to Quash Subpoena.” On January 10, 2012 the LGC filed its response to the “Motion to Quash Subpoena *Duces Tecum* and Notice of Withdrawal of [the December 22, 2011] Subpoena.” Subsequent to withdrawing its own subpoena, on January 12, 2012 the LGC filed a new motion requesting a similar subpoena being issued to Mr. Lang by the presiding officer. Also on January 12, 2012 PFFNH filed an “Initial Response to LGC Motion for Subpoena and Motion to Cancel Jan. 17, 2012 Hearing.” On January 13, 2012 new counsel appeared for respondent Maura Carroll and prior counsel withdrew from representation on January 26, 2012. On January 26, 2012 respondent Andrews filed his “Response to PFFNH’s Initial Response to LGC Motion for Subpoena,” to which response LGC joined on January 27, 2012.

A hearing was conducted on Monday, January 30, 2012 with counsel present for all parties to the so-called “Local Government Center et al” administrative proceeding. Counsel for the remaining individually named board members was delayed with proper notice provided and participation in the early portion of the hearing waived. In addition, counsel representing the PFFNH was present and having filed its “Motion to Quash [the initial LGC subpoena]” against its president, David Lang, also opposed the new LGC motion. The LGC withdrew the original subpoena it issued on December 22, 2012. The validity of that subpoena therefore had become moot by the start of the hearing. The subsequent LGC motion requests that the presiding officer issue a subpoena *duces tecum* upon David Lang in his capacity as president of the Professional Fire Fighters of New Hampshire, an association that earlier in the proceedings had unsuccessfully sought to become an intervenor. The other parties’ related filings were submitted in support of LGC’s desire to depose David Lang or in opposition to the conduct of the

deposition by BSR. LGC also joined in respondent Andrews' "Response to PFFNH's Initial Response to LGC Motion for Subpoena" that essentially argued in support of the presiding officer's statutory authority to issue the requested subpoena. Following a review of all relevant filings regarding the subpoena issues presented at hearing and the content of offers and oral arguments made, and reference as appropriate to all facts found in earlier hearings in this matter which are incorporated hereto and made a part hereof, the undersigned presiding officer determines as follows:

FINDINGS OF FACT

1. David Lang is president of the Professional Fire Fighters of New Hampshire ("PFFNH").
2. In the capacity of president of the PFFNH, David Lang served on the Board of Directors of Health Trust, Inc. until his resignation by letter dated January 9, 2003.
3. The PFFNH has been an adversarial party to LGC in at least two previous judicial proceedings conducted in the Merrimack Superior Court initiated in 2004 and 2009.
4. The PFFNH is not a party to this administrative proceeding.
5. The PFFNH is an unsuccessful intervenor in this administrative proceeding.
6. A complaint raising issues later embodied, in part, in the BSR staff petition was signed by the so-called "original complainant," James Squires, president of the Hampton Fire Fighters Association. (October 18, 2011 Hearing, LGC Exhibit #1)
7. On September 2, 2011 the BSR filed a staff petition which contains four counts alleging statutory violations appearing in said petition in categories entitled:

- Attempted Merger of Prior Nonprofit Corporations with LLC's
- Pooled Risk Management Program Statutory Requirements
- Requirement to Return Surplus (to political subdivisions)
- Improper Spending
- Improper Tying Arrangement (between Health Trust LLC and LGC, Inc. and NHMA, LLC (New Hampshire Municipal Association))
- Offer and/or Sale of Unregistered Securities
- Failure to Register as Broker-Dealers and Issuer-Dealers
- Untrue Statements of Material Fact and Omissions of Material Fact in Connection with the Offer, Sale or Purchase of Securities and Engaging in Conduct Which Operates or Would Operate a Fraud or Deceit
- Untrue statements of Material Fact and Omissions of Material Fact in Connection with the Offer, and/or Sale of Non-equity Membership Interests in NHMA,LLC
- Untrue statements of Material Fact and Omissions of Material Fact in Connection with the Offer, and/or Sale of the "Risk Pool" Investment Contracts in the Defendant Affiliate LLC's
- Engaging in any Act, Practice, or Course of Business that Operates or Would Operate as a Fraud or Deceit upon any Person

8. All other relevant facts previously admitted or stipulated by the parties, or found, or administratively noticed by the presiding officer are incorporated into this decision.

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 LGC seeks pre-hearing discovery by requesting that a subpoena *duces tecum* be issued by the presiding officer ordering a non-party to attend deposition and produce documents. In addition to the usual discretion allowed a judicial or administrative hearing officer to determine permissible discovery, specific statutory authority is provided in RSA 421-B:26-a and RSA 5-B, IV to allow the presiding officer to issue a subpoena or cause depositions to be taken. A subpoena is ordered in accordance with that authority. The presiding officer, applying reasoned and authorized discretion, has limited the areas of inquiry and scope of production based upon the relevance and materiality of the information sought by the LGC through testimony and production of documents.

DECISION AND ORDER

This is another motion directed at pre-hearing discovery of information. The LGC is requesting the presiding officer to issue a subpoena ordering David Lang, the president of the New Hampshire Professional Fire Fighters (NHPFF), to give testimony and produce documents relevant to the issues raised in the BSR staff petition and the LGC's answer. The LGC states that there is permissive statutory authority to allow the presiding officer to issue a subpoena to deposition requiring Mr. Lang to attend, give testimony and produce certain documents at the deposition. In objecting to the LGC's request the NHPFF asserts that (1) there is no statutory authority that permits this action; (2) Mr. Lang does not possess relevant information or information that may lead to the discovery of relevant information; and, (3) to subpoena Mr. Lang to deposition and require his production of the requested documents or records would be unduly burdensome and impose on privileged information.

There should be little question regarding the statutory authority granting discretion to the presiding officer to issue a subpoena in this administrative proceeding. There is sufficient statutory authority provided within RSA 421-B:26-a, XIV(g) and RSA 5-B:4-a, III to permit the presiding officer to issue a subpoena to deposition. The former expressly authorizes the presiding officer to "take, or cause to be taken, depositions." The latter expressly authorizes the presiding officer to "subpoena witnesses, compel their attendance... and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which [the presiding officer as the Secretary of State's designee] deems relevant or material." Also, RSA 5-B:4-a II provides that the presiding officer "shall have all powers specifically granted or reasonably implied in order to perform the substantive responsibilities imposed by [the statute]." The determination as to whether a deposition should be ordered through use of a subpoena and

the determination of the scope of inquiry to be allowed are within the parameters of such express or implied powers.

In New Hampshire deposition by oral interrogatories of parties, experts or fact witnesses, or potential witnesses at deposition is an accepted method of pre-hearing discovery where determined by the presiding officer to be appropriate. That the proposed deponent is not a party does not make him immune from assisting this truth seeking proceeding to the extent that his participation contributes information that is relevant and material. RSA 5-B:4-a III. That the issuance of the requested subpoena is for the purpose of deposition and not for attendance at a final hearing likewise does not prevent its issuance if it will contribute to the orderly conduct and completion of these proceedings. RSA 421-B:26, XIV (p). That a party to this administrative proceeding has requested the presiding officer to issue a subpoena rather than the presiding officer issuing it *sua sponte*, *i.e.* on his own, does not limit his authority to do so. *Id.* XIV (g). Therefore, to the extent that the presiding officer reasonably concludes that a proposed deponent possesses factual knowledge or documents that are “relevant and material” to the proceeding, a subpoena may be issued. However, presiding officers conducting administrative proceedings are also permitted broad discretion consistent with statutes, rules, and precedents to determine the limits of discovery.

Mr. Lang was a member of the Health Trust, Inc. Board of Directors prior to January 9, 2003 during a period of time in which issues, later to become manifest and subject of the BSR staff petition relating to the operation of that entity and the relationship of that entity to other entities previously designated in these hearings as LGC affiliated entities, were discussed or acts were undertaken. Having served in that capacity it is reasonable to believe that he may have information that is relevant and material to the issues presented by the BSR staff petition and the

respondents' answers in reply to the allegations of BSR. Mr. Lang was a member of this Board of Directors, not in an individual capacity, but in a representative capacity because he was president of the Professional Fire Fighters of New Hampshire, a group consisting of contributors to, and beneficiaries of, certain health services and products provided through the Health Trust, Inc. The actions of Health Trust Inc. are, *inter alia*, at issue in these administrative proceedings. It is reasonable to believe that Mr. Lang, as president of the PFFNH, provided input to the Board of Directors based upon the interests of that association or undertook other actions on behalf of the PFFNH that are relevant and material to the operation of the Health Trust, Inc. during his tenure on that Board. Therefore, I find that Mr. Lang may properly be issued a subpoena to give testimony at deposition within the scope of examination as set forth herein.

The LGC outlines in its motion several areas of inquiry it would like to pursue at deposition (LGC motion ¶ 5, see seven “bulleted” areas of inquiry) and describes in its proposed subpoena *duces tecum* several categories of documents or records it seeks. (Appendix A, Exhibit A, three “bulleted” categories). Whether the stated requests delineating intended areas of inquiry or requests for production of documents through deposition are permissible depends on meeting the relevant and material standard. The two words “material” and “relevant” are used in legal proceedings as a pair so often that the distinction between them becomes blurred at times. In legal proceedings, information, whether testimonial or documentary, is “material” if it is “[i]mportant; more or less necessary; having influence or effect; going to the merits.” (Black’s Law Dictionary). Webster’s Ninth New Collegiate Dictionary defines “material” as “having real importance or great consequence”. In legal proceedings, information, whether testimonial or documentary, is relevant if it applies, “to the matter in question; affording something to the purpose.” (Black’s Law Dictionary). Relevant information implies a relationship, a tendency to

make the existence of any fact that is of consequence to the determination of an action more probable or less probable than it would be without the information. (See *N.H. Ball Bearings, Inc. v. Jackson*, 158 N.H. 421, 431 (2009), citations omitted). When these two words are used together to describe information that is properly sought through subpoena to deposition, the information sought should not consist of mere facts or mere numerals but should consist of facts and numerals that go to the merits of the issues raised in these administrative proceedings in an important, necessary, influential, and consequential way. If the interrogatory cannot be shown to elicit information that can meet the relevant and material standard, it is not permissible at the deposition and, if asked, need not be answered by Mr. Lang.

The following LGC listed areas of inquiry (LGC motion ¶ 5) at deposition or inquiries designed to seek similar information are not permissible because I do not find that relevant and material information will be produced: Bullet #1 and Bullet #7. Also as to Bullet #1, I find that this matter has been concluded in another forum and there has not been a sufficient showing that this lawsuit “formed the basis for the BSR’s Staff Petition.” If, in fact, it did, the record of that proceeding is available to any party, including the opportunity to obtain transcripts of any testimony. Also as to Bullet #7, I find that there has been an insufficient showing, by offer of proof or otherwise, that Mr. Lang’s testimony before a House Select Committee regarding proposed legislative amendments to RSA 5-B is relevant and material to the issues raised in this administrative proceeding, which alleges that acts of the respondents violated RSA 421-B and RSA 5-B and questions in this area of inquiry are not permissible. As to Bullet #2, the scope of inquiry stated as “any connection between the PFFNH and the complaint(s) that was lodged with the BSR regarding LGC” I find is unnecessarily broad in its scope. A permissible scope of inquiry is granted to the respondents’ and shall be limited to “any discussions or communications

between Mr. Lang or the association named the “Professional Fire Fighters of New Hampshire” and the BSR staff, alone, related to the violations contained within the staff petition that initiated these administrative proceedings or the defenses asserted.” As to Bullet #3, inquiries shall be limited to the span of time Mr. Lang served as a member of the Health Trust, Inc. Board of Directors concluding with his resignation on January 9, 2003. Since it can reasonably be anticipated that the deponent may not recall actions with the precision inquiring counsel may desire given the nine years that has transpired since his resignation, caution should be exercised and respect extended to this deponent as with any individual participating in a deposition.

As to Bullet #4, Bullet #5 and Bullet #6, I do not find that relevant and material information would result from inquiries regarding direct contact or communications with the Secretary of State or his immediate office staff other than the BSR staff. However, I do find that there is sufficient basis for relevant and material information to arise from discussions and written communications Mr. Lang may have had with the BSR staff. Therefore proper inquiries shall be permissible regarding “any discussions or communications between Mr. Lang or the association named the “Professional Fire Fighters of New Hampshire” and the BSR staff, alone, related to the violations contained within the staff petition that initiated these administrative proceedings or the defenses asserted.” Also as to Bullet #6, I find that inquiries for testimony of Mr. Lang or production of documents by Mr. Lang revealing communication to “any third parties relating to LGC” exceed reasonable limits of discovery in this administrative proceeding involving this non-party. Inquiries or production regarding “any discussions or communications between Mr. Lang or the association named the “Professional Fire Fighters of New Hampshire” and the BSR staff, alone, related to the violations contained within the staff petition that initiated these administrative proceedings or the defenses asserted” are permissible.

The LGC's motion also requests that Mr. Lang bring certain documents and records with him at the time of deposition. (See LGC motion, Exhibit A). The documents and records sought by the LGC fall into three categories each one of which is also designated by a "bullet" symbol. Document Production Bullet #1 seeks communications between BSR and "David Lang and/or the Professional Fire Fighters of New Hampshire ("PFFNH") or any other affiliated entity..." Such a request calls for documents and records that are either initiated or received by the BSR, a party to this administrative proceeding. A similar request of the LGC was addressed in a previous order, dated January 19, 2012, related to discovery wherein the following requests by the LGC for production of documents were granted:

10. Copies of all communications with the Professional Fire Fighters of New Hampshire.
11. Copies of all communications with the Professional Fire Fighters of Hampton, New Hampshire.
12. Copies of all communications with David Lang.

Therefore the requests expressed in this first category appear to be redundant as such communications can reasonably be interpreted to include "E-mails and other written correspondence between the [BSR] and David Lang and/or the [PFFNH]." Further, as the LGC has not filed any motion based upon the failure of the BSR to produce such information as required by previous orders, it is reasonable to conclude that such information, if it exists, has been provided by BSR, a party to this litigation. Further, there is insufficient proof provided by the LGC to establish or allow reasonable determination of what constitutes an "affiliated entity" in this context or that relevant and material evidence would result from communications of innumerable other non-party "affiliated entities" or that such a request would not prove unduly

burdensome upon Mr. Lang. The possible exception shown to date may include the Professional Fire Fighters of Hampton, New Hampshire as it has been labeled the “original complainant” in an earlier proceeding¹. But again, the more reasonable source for the provision of communications relevant and material to the issues raised in the staff petition is the BSR and that production that has previously been ordered and is presumed to have been produced.

Document Production Bullet #2 requests that the deponent produce “E-mails and other written correspondence between the [BSR] and David Lang and/or the [PFFNH] or any other affiliated entity” and Secretary of State William Gardner. Again I find insufficient facts that would establish that Secretary Gardner, himself, could reasonably be thought to have generated relevant and material communications with the suggested recipients. Further, I find insufficient facts that would indicate that as between the Secretary of State and the staff of the BSR, communications that may be relevant and material to the issues raised in the BSR staff petition would not have been redirected to the custody of that specific sub-division of his office initiating this administrative proceeding and conducting the investigation that preceded the filing of the staff petition. As with Document Production Bullet #1, I also find there is insufficient proof provided by the LGC to establish or narrow what an “affiliated entity” is or that relevant and material evidence would result from communications with innumerable other non-party “affiliated entities” or that such a request would not prove unduly burdensome upon Mr. Lang. Last, I find that the requests as expressed in Document Production Bullet #2 are overly broad in scope.

¹ A copy of the letter from the so-called “original complainant,” James Squires, president of the Professional Fire Fighters of New Hampshire, to Fred Welsh was entered into the record as LGC Exhibit #1 as part of the intervention hearing conducted on October 18, 2011.

The requests sought in Document Production Bullet #3 seek, among other things, “any and all E-mails and any other written correspondence between any third party and David Lang and/or the PFFNH or any affiliated entity ... regarding Local Government Center, Inc. and any of its affiliates, and/or any of the issues raised in the [staff petition].” There is insufficient proof offered by the LGC as to the relevancy and materiality of this Document Production Bullet Request #3 that justifies its overly broad scope, an unduly burdensome production effort, and ensures that such discovery would contribute to the orderly dispatch of this administrative proceeding. Therefore production of the documents sought by this request #3 is denied.

It is hereby further ordered that:

- A. A subpoena *duces tecum* shall issue to David Lang, president of the Professional Fire Fighters of New Hampshire in the form of the subpoena attached to this order and limitations as determined above and on its face. Areas of inquiry that were not included in the LGC motion dated January 10, 2012 are not subject to questioning without mutual assent of all parties present at the deposition.
- B. The responsibility for proper service of the subpoena *duces tecum* in accordance with all applicable law shall rest with the LGC after a date for the deposition has been agreed to, or if necessary further ordered by the undersigned, and after the date for attendance has been affixed to the subpoena *duces tecum*.
- C. The parties shall undertake reasonable good-faith effort to reach agreement on a date and time for deposition that is mutually agreed. In the event that the agreement to future date and time cannot be reached within two business days of the date of this

- order, the LGC shall notify the presiding officer of the inability of the parties to agree, at which time the presiding officer shall set the date by instruction to the LGC.
- D. All costs for proper service of the subpoena *duces tecum* upon Mr. Lang shall be paid by the LGC as shall all witness fees as he is deemed a non-party to this administrative hearing.
- E. The LGC shall file a copy of its return of service with the presiding officer.
- F. In the event that the place, date, or time of deposition shall be changed by mutual agreement following service of the subpoena, the LGC shall immediately inform the presiding officer.
- G. The documents required to be produced are described in Exhibit A to the subpoena *duces tecum*.
- H. All previous orders not inconsistent with this order remain in full force and effect.

So ordered, this 6th day of February, 2012


Donald E. Mitchell, Esq.
Presiding Officer

SERVICE LIST

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