

**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
)
_____)

RESPONDENTS’ MOTION TO STAY FINAL ORDER

Respondents Local Government Center, Inc. and affiliated entities (collectively “LGC”) hereby move pursuant to RSA 421-B:26-a, XXVIII to stay the Hearing Officer’s Final Order of August 16, 2012 (the “Order”).

I. Introduction.

This is a case of firsts. The Bureau of Securities Regulation (the “Bureau”) only gained authority to investigate and bring administrative actions to enforce RSA 5-B in 2010. The Bureau’s Staff Petition, and its Amended Petition, were the first ever such petitions brought against any of New Hampshire’s RSA 5-B entities. The hearing in this case was the first of its kind. Consequently, this case has raised issues that must be considered for the first time, including questions regarding the interpretation of RSA 5-B, the due process rights of LGC, and the New Hampshire and Federal constitutional limitations on the hearing process and the Order itself.

These novel questions are very much in dispute. LGC has filed a Motion for Reconsideration of the Order addressing them. The questions are critical to LGC, and therefore, LGC will pursue the questions on appeal to the New Hampshire Supreme Court, if necessary.

Until the appellate process is properly completed, the requirements of RSA 5-B, and the authority of the Bureau and the Hearing Officer under RSA 421-B:26-a, cannot be finally determined. The Order should be stayed so as to avoid imposing irreparable harm, hardship, and inequity upon LGC.

Because of the pending Motion for Reconsideration; the novel issues of law—constitutional and otherwise—raised by this enforcement action, hearing, and resulting Order; the imminent appellate process; and the irreparable harm which Respondents would suffer if the Order were enforced prematurely; Respondents move pursuant to RSA 421-B:26-a, XXVIII to stay the Order in its entirety.

II. LGC’s Motion for Reconsideration presents significant novel and constitutional issues regarding an untested statutory scheme and process.

The Hearing Officer issued the Order on August 16, 2012. The Order discussed Respondents’ alleged violations of RSA 5-B and RSA 421-B as identified in the Bureau’s amended petition of February 17, 2012 (the “Amended Petition”). The Order contains twenty-one distinct commands, including, but not limited to: (1) directing Respondents to reorganize its two pooled risk management programs within 90 days of the date of the order or lose its RSA 5-B exemption from state insurance laws and state taxation; (2) compelling LGC to confer with the Bureau within 30 days from the date of the order to develop a plan for the return of \$33,200,000.00 to the members of HealthTrust risk pool management program; (3) compelling LGC to confer with the Bureau within 30 days from the date of the order to develop a plan for the return of \$3,100,000.00 to the members of Property-Liability Trust risk pool management program; (4) requiring LGC HealthTrust to immediately purchase reinsurance; (5) imposing a ceiling on reserves held by HealthTrust at the lower of fifteen percent (15%) of claims or an RBC of 3.0; (4) directing the reorganization and distribution of the assets of Local Government

Center Real Estate Inc. (“LGC Real Estate”) within 90 days of the date of the order; and (5) making the Secretary of State’s September 2, 2011 Cease and Desist Order permanent.

In response, LGC argues in its Motion for Reconsideration that the Hearing Officer should reconsider: (1) his decision not to withdraw from this case because of the improper pecuniary incentives created by his financial arrangement with the Secretary; (2) his disregard for the violation of LGC’s right to fair notice and due process caused by the Bureau’s failure to publish their novel interpretations of the requirements of RSA 5-B prior to the Staff Petition charging LGC with statutory violations; (3) his determination that LGC’s reserve-setting methods or reserve levels violated RSA 5-B; (4) his disregard of the exercise by LGC’s Board of Directors of its sound business judgment in setting reserves and operating the risk pools; (5) his determination that LGC’s corporate structure or conduct violated RSA 5-B; (6) his violation of the New Hampshire Constitution’s rule against retrospective legislation, caused by the portion of the Order purporting to undo transfers between LGC entities executed before the Secretary obtained regulatory authority in June 2010; and (7) other specific rulings and findings the Hearing Officer made that constitute errors of law, errors of reasoning, or erroneous conclusions.

The breadth and scope of these issues, in interpreting RSA 5-B, is unprecedented.

III. The Hearing Officer has broad power to stay his own order or decision.

RSA 421-B:26-a permits the Hearing Officer to stay any order or decision, provided the motion to stay is premised upon a motion for reconsideration. RSA 421-B:26-a, XXVIII. Furthermore, the Supreme Court has stated that “The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket.” *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *Hewlett-Packard Co., Inc. v. Berg*, 61 F.3d 101, 105 (1st Cir. 1995); *see generally*, Gordon J. MacDonald, Wiebusch on New Hampshire

Civil Practice and Procedure § 57.17 (Matthew Bender & Co.) (“the trial court may enter an order staying enforcement of its order or execution in order to allow the parties to present further motions or arguments, to permit appellate review on an extraordinary writ, or to permit the conclusion of another related proceeding.”).

IV. The instant case is a novel prosecution which tests the meaning and constitutionality of RSA 5-B.

RSA 5-B was amended only in 2010 to provide the Secretary of State, for the first time, with authority to investigate violations of 5-B and to bring administrative actions to enforce the chapter. The instant case is the first petition filed by the Bureau against any of New Hampshire’s pooled risk management programs. The resulting hearing was an entirely new adjudicative process. In fact, the entire process has been an exercise in trail blazing both substantive and procedural ground.

As befits such a previously unused and unchallenged process, there have been many questions raised prior to, during, and after the hearing regarding the specific requirements of RSA 5-B and the procedural requirements and limitations of RSA 421-B:26-a. As LGC argues in its Motion for Reconsideration, the Bureau’s investigation and prosecution of this case violated LGC’s rights to fair notice and due process; the hearing was procedurally improper because the Hearing Officer ought to have withdrawn; and, additionally, the Order’s interpretation of RSA 5-B impermissibly extends beyond the clear language of the statute. Without a stay, enforcement of the Order would proceed without final resolution of the questions raised in the course of this novel and inaugural process, and without resolving legal questions fundamental to the Order itself. This imposes potentially irreparable harm on LGC, and should be avoided. For these reasons, the Order should be stayed pending the completion of the appellate process.

V. The Hearing Officer should issue a stay in the face of novel questions of law, to preserve the status-quo until the completion of appellate review.

The New Hampshire Supreme Court has recognized that stays may be imposed where novel questions regarding an untested statute are raised, and the consequences of the challenged order are significant. *See State v. Campbell*, 110 N.H. 238, 242 (1970). Furthermore, LGC is entitled by statute to have its case independently reviewed by an appellate tribunal. RSA 541:6. The right to “[m]eaningful review entails having the reviewing court take a fresh look at the decision of the trial court before it becomes irrevocable.” *Providence Journal Co. v. FBI*, 595 F.2d 889, 889 (1st Cir. 1979) (imposing a stay to preserve the status-quo for the reviewing court). In the instant case, imposition of the Order would destroy the status quo, and LGC’s right to an appeal would become meaningless unless a stay is imposed, pending determination of the appeal. *See Id.*

Until the questions raised by LGC regarding the hearing process and the requirements of RSA 5-B have been finally answered, the Order should be stayed. If the Order is enforced, the decisions of the Hearing Officer will become irrevocable, and LGC’s right to appellate review would be meaningless.

VI. If LGC succeeds on its Motion for Reconsideration or on appeal, then the extensive requirements of the order will be reversed.

If the Order is immediately enforced, LGC will suffer a clear case of irreparable harm and inequity, thereby rendering LGC’s pursuit of its arguments for reconsideration or on appeal a meaningless gesture. Enforcement of the order would subject LGC and its risk pools to enormous disruption and expense caused by requiring LGC to completely restructure its operations and its finances, including the payment of more than \$50 million. Specifically, among other commands, the Order requires: that LGC engage in a near-total corporate

restructuring of its risk pool programs; that it return over \$33 million to its members through a process to be approved by BSR; that it revamp its business model by immediately purchasing reinsurance; that it reorganize and distribute the assets of Local Government Center Real Estate; and that it adopt a new reserve calculation method. If LGC is later successful in its challenges to the Order, then it will have already unnecessarily restructured its entire governing structure and operations at considerable expense; and divested itself of more than \$33 million of LGC HealthTrust assets that should have appropriately been retained as reserves to protect its members from future uncertainty and unexpected losses.

VII. The balance of competing interests weighs strongly in favor of a stay.

A court considering a motion to stay must weigh “competing interests and maintain an even balance;” accordingly, the party requesting the stay must “make out a clear case of hardship or inequity.” *Landis v. North American Co*, 299 U.S. at 255. In these circumstances, LGC has demonstrated an overwhelming case of hardship if the Order is implemented before meaningful appellate review. The First Circuit has held that where “the denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay.” *Providence Journal Co. v. FBI*, 595 F.2d at 889.

In the instant case, granting the stay will preserve LGC’s rights to meaningful review of the serious legal questions at issue and will cause no harm to either the Bureau or the public. Granting the stay will only postpone the imposition of the Order by whatever period of time is necessary to hear and decide the appeal. “Weighing this latter hardship against the total and immediate divestiture of [LGC’s] rights to have effective review in [court], [tilts] the balance of hardship to favor the issuance of a stay.” *Id.*

VIII. Conclusion.

The Order imposes burdensome requirements on LGC to the extent that LGC must dramatically alter the manner in which it does business if the Order becomes final. Upon the completion of the reconsideration and appellate process, the standing questions regarding RSA 5-B and 421-B:26-a will be resolved. If the questions are answered consistent with the Order, LGC will promptly comply with its terms. But before that point, when the requirements of the Order could still be overturned, modified, or reversed, denying a stay and forcing LGC to acquiesce to the requirements of the Order poses a great risk of irreparable harm to LGC, to its constitutional rights, and to the members whose interests LGC represents. For that reason the Order should be stayed until completion of the reconsideration and appellate process.

Counsel for the Bureau was contacted. The Bureau opposes the request for a stay.

WHEREFORE, LGC respectfully requests that the Hearing Officer:

- A. Stay his Final Order of August 16, 2012 until the appellate process in this case is completed; and
- B. Grant any other such relief as may be necessary and proper.

Respectfully submitted,
LOCAL GOVERNMENT CENTER, INC., *et al*

By Their Attorneys:

Dated: September 14, 2012

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CERTIFICATE OF SERVICE

I certify that on the 14th day of September, 2012, I filed two printed copies with the Office of the Secretary of State, and forwarded copies of this pleading *via* e-mail to all counsel of record.

/s/ William C. Saturley