

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

2012 TERM

Case No. 2012-0729

In re: Local Government Center, Inc., *et al.*

BUREAU OF SECURITIES REGULATION'S
MEMORANDUM ON QUESTION PRESENTED BY THE COURT
REGARDING REMAND

NOW COMES the Appellee, the New Hampshire Bureau of Securities Regulation (the "Bureau"), through counsel, the New Hampshire Attorney General and Bernstein, Shur, Sawyer & Nelson, P.A., and submits this memorandum in response to the Court's March 7, 2013 Order and in support of remand.

Question Presented

By Order dated March 7, 2013, the Court requested memoranda from the parties and proposed intervenors on the following question:

If this Court should affirm the portion of the BSR's decision requiring the return of "excess" monies to members pursuant to RSA 5-B:5, I(c), will a remand then be necessary for the BSR to determine the amount of "excess" monies to which each member and former member is entitled?

Appeal of the Local Government Center, Inc., Order (March 7, 2013), Case No. 2012-0729.

Discussion

The Presiding Officer's August 16, 2012 Final Order established that the return of surplus by the Local Government Center, Inc. and its related entities (collectively "LGC") must be made "in proportion to each member's contributions to [the excess] amount of earnings and surplus"

held by LGC. Final Order at 75.¹ However, the Final Order does not specify the precise calculation to be used to determine proportional contributions, and the Final Order is inconsistent with regard to the class of current and former members of the LGC risk pools that are eligible for a proportional share of the return of “excess” surplus funds currently held by LGC. *Compare* Final Order at 75-76 (ordering return of \$33.2 million “to members who participated in the Local Government Center’s Health Trust risk pool management program at any time after June 14, 2010” if the parties submit “an agreed upon plan for the return”), *with* Final Order at 76 (ordering return of the \$33.2 million “to members that participate in the . . . Health Trust risk pool management program on the date of this order [August 16, 2012]” in the absence of an agreed upon plan).²

The questions of the proper allocation of the “excess” monies and the correct class of current and former members eligible for such allocation requires determination of factual questions that were not addressed below. Regardless of what temporal cut-off is identified for membership in the class of eligible beneficiaries,³ allocation of the “excess” monies requires, at a minimum: (1) identification of each member of the eligible class and the dates of their membership with each LGC risk pool; (2) the precise amount paid in premiums each year by each eligible member; and (3) the proportion of each eligible members’ premium payments that contributed to the “excess” surplus and earnings held by LGC. The last component may require

¹ The Final Order is reproduced at page 1 of the Appendix to LGC’s Appeal by Petition submitted to this Court.

² The LGC declined to negotiate a plan for distribution of excess with the Bureau because it considered the Final Order inoperative until conclusion of the appeal notwithstanding R.S.A. 541:18 and R.S.A. 421-B:26-a, XXVIII.

³ There may also remain a legal question as to whether the Presiding Officer can consider member contributions made prior to June 14, 2010 when the Bureau was given statutory powers to investigate and regulate 5-B pools. R.S.A. 5-B:4-a.

expert actuarial analysis.⁴ The requisite facts for these findings were not developed below and are not part of the record on appeal to this Court.

Accordingly, in order for this Court to equitably allocate the returned “excess” monies among LGC’s current and former members, the Court would necessarily have to develop a new factual record and engage in factfinding. However, this runs counter to the Court’s role in reviewing administrative decisions. *See* R.S.A. 541:14 (“No new or additional evidence shall be introduced in the Supreme Court . . .”). Moreover, the Court has a long-standing precedent of remanding cases where detailed factual findings are required. *See, e.g., Smith v. City of Franklin*, 159 N.H. 585, 594 (2010) (remanding for further factual findings because “these are factual determinations, which we decline to address in the first instance”). Thus, the Bureau submits that a remand to the Presiding Officer for development of the factual record necessary for an allocation of the returned monies would be appropriate following an order by this Court upholding the Presiding Officer’s Final Order with respect to return of “excess” monies to LGC’s current and former members.

In addition, the Bureau notes that an allocation of the monies ordered returned by LGC may include provision for the return to municipal employees and retirees of the proportion of the returned monies they contributed to the LGC risk pool premiums. As the Court is aware, premiums paid to LGC by municipal entities included employee contributions. Retirees may directly participate in the risk pools. Moreover, many participating retirees exercised their option to have their premium payments withdrawn directly from their pension checks. This adds a potential additional layer of factual findings that, to the extent they are necessary to effectuate

⁴ This approach assumes the excess is determined as of June 14, 2010 rather than based upon a year by year basis because the excess is cumulative. *See also* fn 3. Contributions on a year by year basis may be actuarially calculated if the Court or Presiding Officer concludes that this approach is permissible under RSA 5-B.

the Presiding Offer's Final Order, would more appropriately be considered and determined by the factfinder rather than in this Court.

Conclusion

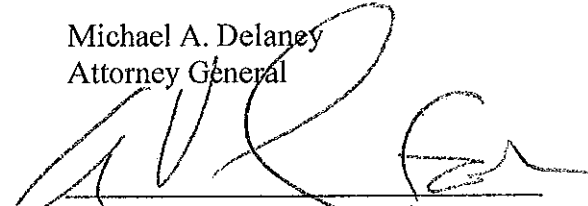
For all of the foregoing reasons, the Bureau answers the question presented by the Court in the affirmative.

Dated this 22nd day of March, 2013

Respectfully submitted,

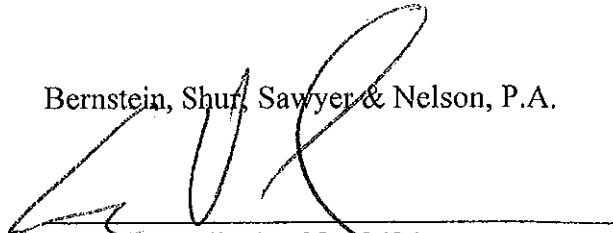
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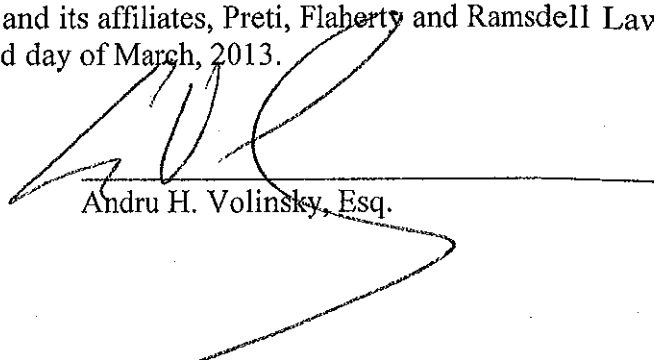
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Certificate

I hereby certify that the foregoing Memorandum was provided to counsel for the Towns of Durham, Northfield, Peterborough, and Salem, Joshua L. Gordon, Esq., and to counsel of record for the Local Government Center, Inc. and its affiliates, Preti, Flaherty and Ramsdell Law Office by U.S. Mail, postage prepaid, this 22nd day of March, 2013.



Andru H. Volinsky, Esq.