

Via Hand-Delivery

March 22, 2013

Eileen Fox, Clerk
NEW HAMPSHIRE SUPREME COURT
One Charles Doe Drive
Concord, NH 03301

RE: 2012-0729, Appeal of Local Government Center, Inc., & a.

Dear Ms. Fox:

Please find enclosed the original and seven (7) copies of Local Government Center, Inc.'s Brief Memorandum in Response to the March 7 Order Concerning a Possible Remand relative to the above matter.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,



Brian M. Quirk

BMQ/tew
Enclosure

cc: William C. Saturley, Esq.
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STATE OF NEW HAMPSHIRE
SUPREME COURT
2012 TERM

No. 2012-0729

APPEAL OF THE LOCAL GOVERNMENT CENTER, INC. & a.

**LOCAL GOVERNMENT CENTER, INC.'S BRIEF MEMORANDUM
IN RESPONSE TO THE MARCH 7 ORDER CONCERNING A POSSIBLE REMAND**

Local Government Center, Inc. and its affiliated entities (collectively "LGC"), submit the following brief memorandum in response to the Supreme Court's Order of March 7, 2013. LGC believes that no remand would be necessary, should this court affirm the return of "excess" monies to members pursuant to RSA 5-B:5, I(c).

I. The Question.

This Court's order of March 7 requested each party to file a brief memorandum on the following question:

[I]f 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?

(Emphasis in original.) LGC believes no remand would be necessary under the contingency described by the Court, for the following reasons.

II. The August 16, 2012 BSR Order Lays Out a Clear Mechanism for Returning Surplus Funds, Should the Court Affirm That Part of the Order.

The August 16, 2012 BSR order (the "Order") determined that the amount of earnings and surplus held by LGC as of December 31, 2010 violated RSA 5-B and was "unreasonably high" in amount. The Order then mandated particular amounts (\$33,200,000 from HealthTrust and \$3,100,000 from Property-Liability Trust) to be returned to members of those respective

programs in proportion to the premiums paid by each member. Order ¶ 8 & 11; *see* Appeal by Petition, Appendix p. 76 - 78.¹

LGC contests those determinations (*see* “Questions Presented for Review” in its Appeal by Petition, numbers 1(a), 1(b), and 2(a), among others). LGC is currently preparing to comply with those portions of the Order, however, as the Order mandated return of the funds no later than September 1, 2013. While LGC moved to stay the Order pending appeal, on November 13, 2012, this Court denied the request for a stay.²

The Order sets forth two alternatives for the return of the funds. First, a (contingent) option for a “negotiated plan” between the BSR and LGC potentially allowed the return of the funds to members who participated in the HealthTrust risk pool management program “at any time after June 14, 2010.”³ “Failing the submission of [such an] agreement,” however, HealthTrust was ordered to “return the \$33,200,000 excess amount in cash to members that participate in the Local Government Center’s HealthTrust risk pool management program on the date of this Order [August 16, 2012], no later than September 1, 2013 in proportion to the premiums paid by said members.” Order ¶8, App. at 76.⁴

The parties were unable to reach an agreement. Thus, should this Court rule that the Hearing Officer had authority to interpret RSA 5-B, and properly did so, and should the Court

¹ The Order is an appendix to LGC’s Appeal by Petition. The page numbers used here are references to the Appendix pages (“App.”).

² As explained below, the Order is clear as to who is entitled to what portion of the return. Thus, unless the Court rules on the Order to return “excess” monies prior to the September 1, 2013 distribution deadline, LGC will distribute these funds pursuant to the Order, prior to that date. In such a case, any remand would be, essentially, moot.

³ June 14, 2010 was the date the BSR obtained regulatory authority over LGC. *See* 2010 Laws, 149:3; RSA-5B:4-a.

⁴ The Order required the identical treatment of the \$3,100,000 ordered to be repaid by Property-Liability Trust. *See* Order ¶11, App. at 78.

affirm the BSR's Order to return "excess" monies, a remand would be unnecessary, as the Order contains an unambiguous directive: distribute the funds to members who participated in the risk pool management program on August 16, 2012 in proportion to the premiums paid by said members.

III. The Hearing Officer Was Aware That Former Members, and Their Contributions, Could Be Determined By LGC.

The Hearing Officer sought out evidence during the hearing on the possibility of determining prior members' contributions. He made specific inquiry of LGC's Chief Financial Officer, Sandal Keeffe, concerning this very topic. First, the Hearing Officer established that data existed to determine each participating member's level of contribution. The following exchange occurred between the Hearing Officer and Ms. Keeffe:

Q...[I]f I were to find that there were funds that should be returned to the members, meaning the political subdivisions, with respect to the HealthTrust on under 5-B [sic], that if I were to do that, that I would, in essence would develop a scheme by which to return those funds...If I, or if you as a CFO for completely other reasons had to recapture, what documents and again, if you could provide me titles, what documents would you refer to, and how, what documents would you refer to that would most accurately describe the contributions in so that a distribution out might be computed accurately. ...

A. Within the information that we have available at Local Government Center, we would certainly have reports that we could run that would show by participating member group how much they have contributed to HealthTrust for purchasing health coverage or other coverage, whatever coverage they might be purchasing, how much they have been invoiced, if you will. Is that what you're referring to?

Q. That would certainly be one element.

A. So you could request that information for any period of time that you wanted. ...

Q. What are those documents referred to as?

A. Member, contributions by member?

Q. Thank you.

Transcript, Day Seven, May 8, 2012, pp. 1556-8.

The Hearing Officer then continued his inquiry, to confirm that *former* members' contributions could also be determined:

Q. [I]f I looked at any of your financial records, would I be able to determine the contributions in by political subdivisions who are currently members? ...

I meant to say who are not currently members but had been members in the past.

A. Yes, you would... We would have that historical information.

Id. at p. 1559 (emphasis supplied).

Accordingly, the evidence demonstrates that, during the hearing, the Hearing Officer inquired whether there was a mechanism for determining contributions by former members. He received an affirmative response. He then offered the parties some flexibility in how the monies could be returned; but also ordered how it should be returned, in the absence of agreement.

IV. Neither Party Appealed The Portion of the Order Setting Out the Distribution.

Generally, only the matters contained in a Notice of Appeal may be considered by this Court. *Compare* Supreme Court Rules 10(1)(c) and 16(3)(b).

While LGC has challenged the Hearing Officer's failure to recuse himself, the constitutional violations created by his Order, his interpretation of RSA 5-B, his determination that monies need to be returned because reserves levels set by the board constitute "excess" funds, and other rulings, neither LGC nor the Bureau appealed his decision that any such return of "excess" monies be made to current members as of the date of the Order.

Accordingly, the Order, if affirmed in this regard by the Court, should proceed as set forth by the Hearing Officer, and a remand on the point is unnecessary.

V. A Remand Prior to Rulings on the Appeal Issues Would Unnecessarily Prejudice LGC, and Waste Public Entity Resources.

If the Court determines for any reason that a remand is necessary, such a remand should occur only after the Court rules on the legal issues raised in the Appeal.⁵

Significant constitutional issues have been raised in the Appeal, including the Hearing Officer's failure to recuse himself in light of a conflict of interest, and his imposition of standards nowhere found in RSA 5-B. Rulings on those issues, or in LGC's favor on such other issues as its Board's right to exercise its business judgment in setting appropriate reserves, would render any remand unnecessary. Remanding the case prior to ruling on these questions would delay resolution of the issues raised by the parties, but also result in an unnecessary expenditure of limited state resources.⁶

Apart from the determination of important constitutional and statutory issues, LGC's compliance with the Order pending appeal adds significant costs and risks to its risk pools. Remanding the case for further factual development on an issue raised neither by the Bureau nor LGC, before ruling on the pending questions of law, would further prejudice LGC.⁷

⁵ In its March 22, 2013 *Memorandum on Question Presented by the Court Regarding Remand* ("BSR Memorandum") the Bureau appears to agree: "Thus, the Bureau submits that a remand ... would be appropriate following an order by this Court upholding the Presiding Officer's Final Order" *BSR Memorandum*, p. 3 (emphasis supplied).

⁶ The Bureau concedes there "may also remain a legal question as to whether the Presiding Officer can consider member contributions made prior to June 14, 2010." *BSR Memorandum*, p. 2, fn.3. Resolving that question is an example of the issues that must be resolved before any remand could be effective.

⁷ For example, the requirement that HealthTrust purchase reinsurance (Order at ¶7, App. 75) adds about \$5 million dollars a year to the cost of HealthTrust's operation, costs that must be passed along to the member political subdivisions in increased rates. Limiting the capital reserve levels HealthTrust may retain (Order ¶6, App. 75), to levels its actuaries deem too low, impacts the rates charged to members and adds future risk to the coverage program. Similarly, the requirement that Property-Liability Trust repay HealthTrust \$17.1 million by December 1, 2013 (Order ¶13, App. 78) adds significant uncertainty to the program.

VI. Conclusion.

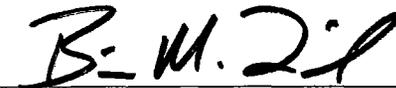
For the reasons set forth herein, no remand would be necessary, should the court affirm that portion of the Order concerning the return of earnings and surplus.

Respectfully submitted,

LOCAL GOVERNMENT CENTER, INC., *et al*
By Their Attorneys:

Dated: March 22, 2013

By:



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CERTIFICATE OF SERVICE

I certify that on the 22nd day of March, 2013, I filed an original and seven copies of the foregoing *Local Government Center, Inc.'s Brief Memorandum in Response to the March 7 Order Concerning a Possible Remand* with the New Hampshire Supreme Court, and forwarded a copy of this pleading via U.S. mail to all counsel of record.

A handwritten signature in black ink, appearing to read "B.M. Quirk", written over a horizontal line.

Brian M. Quirk, Esq.