

**STATE OF NEW HAMPSHIRE**

**DEPARTMENT OF STATE**

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IN THE MATTER OF: )  
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Local Government Center, Inc. et al ) Case No.: C-2011000036  
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RESPONDENTS )  
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**INTERIM ORDER FOLLOWING REMAND**

This administrative proceeding returns to the presiding officer to address the mandate on remand ordered by the New Hampshire Supreme Court. *See Appeal of Town of Salem*, \_\_ N.H. \_\_, 133 A.3d 595, 602 (2016). In that decision, the Court determined “to the extent the presiding officer concluded that he lacked authority to penalize a violation of RSA 5-B:5, I(c) by ordering payment to former members of a pooled risk management program as either restitution or disgorgement, he committed an error of law. Accordingly, we vacate the presiding officer’s decision and remand for further proceedings.” *Id.* The parties to this matter contend different points of view as to the scope of the Court’s mandate on remand.

Because the parties are well familiar with the factual and procedural history of this matter and because the history has been recounted many times, those facts do not bear repeating here. By way of brief summary, litigation in this matter began on September 2, 2011 with a staff petition submitted by the Bureau of Securities Regulation (“BSR”), to the Secretary of State, to initiate an enforcement action against the Local Government Center, Inc. (“LGC”) and certain related entities. To date the numerous novel and complex issues of fact and law have required tens of hearings, numerous administrative orders, substantial structural reorganization of respondent entities, the affirmed disgorgement and redistribution of funds held as illegally retained surplus, and two appeals to the New Hampshire Supreme Court. At this stage in this protracted and highly contested matter, the remaining parties actively participating are: the BSR, as the agency charged with enforcement of RSA chapter 5-B, the governing statute of the state’s pooled risk management programs; HealthTrust, Inc. (“HT”), a

successor in interest to the former LGC; and, a group of eight municipalities<sup>1</sup> with intervenor status.

As a continuation of this administrative proceeding, the BSR presents at this time a Motion to Establish Standing and Define Issues on Remand, dated May 16, 2016. The BSR seeks to present evidence regarding what current and former members may be entitled to restitution or disgorgement and the appropriate amount of relief, if any, to be awarded. It is the BSR's position that the remand is not confined to the above-mentioned eight municipalities who were denied a potential distributive share of the \$17.1 million surplus funds. HT filed its Objection, dated May 25, 2016, contending BSR's Motion is moot because the presiding officer did not commit an error of law. Alternatively, HT contends the BSR's Motion should be denied because the BSR had a full and fair opportunity to litigate the issue of the universe of potential recipients of the \$17.1 million surplus funds, the BSR's Motion exceeds the scope of the Court's mandate on remand, and, for reasons of unfairness, HT may be required to make distributions in excess of the \$17.1 million surplus funds. The BSR then filed a Reply, dated May 27, 2016. Additional pleadings included a Reply filed by the Intervenor's, requesting attorneys' fees if the BSR's Motion is granted. Finally, Property Liability Trust, Inc. ("PLT") has moved for dismissal as a participating party in this remanded administrative proceeding.

## **I. PRESIDING OFFICER'S ERROR OF LAW**

The threshold consideration on remand is whether the presiding officer "concluded that he lacked authority to penalize a violation of RSA 5-B:5, I(c) by ordering payment to former members of a pooled risk management program as either restitution or disgorgement." The Court returned this question to the presiding officer. If he based his conclusion on a lack of authority, the Court concluded that he committed an error of law, and therefore, the remand would require further proceedings. The presiding officer finds he committed an error of law when he wrongfully concluded that the statute restricted distribution of the \$17.1 million surplus funds to a universe comprised only of presently participating pooled risk members.

The presiding officer denied the Intervenor's request for a proportionate share of the \$17.1 million surplus funds based on his conclusion RSA chapter 5-B "does not make provision for any past or former member of a pooled risk management program." The presiding officer interpreted the word "participating" to exclude any past or former member which was not a "currently participating member." This, as the Court points out, is the "error in the presiding officer's reasoning." Until the Intervenor were joined, the presiding officer had not defined the universe of potential recipients. It was after the

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<sup>1</sup> Town of Salem, Town of Bennington, Town of Meredith, Town of Northfield, Town of Peterborough, Town of Plainfield, Town of Temple, and Town of Auburn.

BSR's Motion for Default and the Intervenors' Motion to Intervene that the presiding officer had to look to RSA chapter 5-B for what, if any, authority he had to order payment to former members. His interpretation of the statute led him to conclude that he lacked authority to order restitution or disgorgement to former members. This reasoning led to the denial of the Intervenors' Motion which proposed a distribution, because they were former members, not "currently participating members." The presiding officer erred when he circumscribed the remedy by improperly defining the universe of potential recipients of the \$17.1 million in surplus funds.

## II. SCOPE OF REMAND

The scope of the remand is set by the Court's determination that the presiding officer erred regarding his interpretation of the statute's intent as to the universe of potential recipients. The presiding officer finds sufficient guidance under New Hampshire case law to determine the scope of the remand. In *Scarborough v. R.T.P. Enterprises*, the Court concluded "[a]lthough perfection of an appeal may divest the agency of jurisdiction with respect to issues on appeal, when a case is remanded by this court it means that the case is returned to the administrative agency to take further action in accordance with the opinion of the court." *Scarborough v. R.T.P. Enterprises*, 120 N.H. 707, 709 (1980) (citation omitted) (stating the Court's mandate was limited to the basis of a damage award and not the amount of damages). In a subsequent case, the Court concluded "[t]he scope of the remand is limited by the nature of the error or issue identified." *Kalil v. Town of Dummer Zoning Bd. of Adjustment*, 155 N.H. 307, 312 (2007). Although *Kalil* was addressing a remand to the Zoning Board of Adjustment, the principle applies with equal force. Both cases can easily be read together to provide a working framework for a remand. That is, the tribunal, in this case the presiding officer, can take further action to address the limited nature of the error or issue identified by the Court. The scope of the remand must accommodate the presentation of additional evidence to allow proper determination of which former members may qualify for a proportionate disbursement.

With that framework in mind, the Court "vacate[d] the presiding officer's decision and remand[ed] for further proceedings." The Court "note[d] that [their] decision merely clarifie[d] the scope of the secretary's authority under RSA 5-B:4-a; [they] express[ed] no opinion as to what penalty should be ordered in this case." The presiding officer acknowledges the impact of his error, as having an effect on not only the Intervenors but also other potentially eligible former members. Because the Court vacated the part of the presiding officer's decision that related to former members, and because of the error committed by the presiding officer, the universe of potential recipients, who may share in the distribution of the \$17.1 million surplus funds, may change. This determination necessitates further limited proceedings in accordance with Court's order on remand, as the presiding officer did not make the basic findings of fact

to define the universe of potential recipients and their proportionate share of the \$17.1 million surplus funds. *See Kalil*, 155 N.H. at 312; *Scarborough*, 120 N.H. at 709.

The presiding officer agrees with the BSR; during this remanded administrative proceeding, he must determine whether former HT members are entitled to restitution or disgorgement—the universe of potential recipients—and, if so, the appropriate amount of such remedy—the proportionality of the \$17.1 million surplus funds. HT’s arguments against a scope of remand that includes former members other than the Intervenors does not persuade the presiding officer. The presiding officer finds HT confuses issues preserved for appeal with the Court’s mandate to address an issue in this matter that has been vacated in part and currently remains undeveloped. On the other hand, the BSR’s position is consistent with its enabling statutes which grant it regulatory authority over pooled risk management programs and complies with the Court’s mandate on remand.

### **III. MERITS OF PRECLUSION**

It is well established that the policies behind collateral estoppel, *res judicata*, and other doctrines with preclusive effect “include[] considerations of judicial economy and finality in our legal system to avoid repetitive litigation.” *Tyler v. Hannaford Bros.*, 161 N.H. 242, 246 (2010) (quotation omitted). Finality underscores judicial economy. The Court vacated and remanded the presiding officer’s decision for further proceedings. In doing so, it did not place finality on the issue of the universe of potential recipients who may receive a proportionate share of the \$17.1 million surplus funds. For the reasons previously discussed, the issue awaits finality. HT’s arguments in favor of preclusion cloud this rationale.

HT’s position hinges on certain arguments by the parties that were made, or not, in earlier points during this administrative proceeding. It includes references to the BSR’s Amended Petition, statements made in a Termination Notice—which was terminating the “so-called secret” agreement—and hearings and pleadings leading up to the presiding officer’s denial of former members from receiving a proportionate share of the \$17.1 million surplus funds. This action taken by the presiding officer improperly circumscribed the remedy under RSA chapter 5-B, as concluded by the Court. To resolve this issue, the Court clarified the scope of the secretary’s authority. Whether, or not, the presiding officer committed an error of law, the Court’s opinion states the law; former members are considered among the universe of potential recipients under RSA chapter 5-B. Because the presiding officer did commit an error of law, it is now necessary to identify the members who compose the universe of potential recipients and their proportionate share of the \$17.1 million surplus funds. The Court’s mandate on remand is not a call to re-litigate issues which, through a full and fair opportunity to respond, have reached finality. Instead of affirming the presiding officer’s decision or declining to entertain the Intervenors’ assertion on appeal, the Court vacated and

remanded. It did so because, after having clarified the law, the Court does not find facts. A conclusion to the contrary would prevent a tribunal from complying with the reviewing Court's mandate on remand.

Equally unpersuasive as to preclusion of a remand in accordance with the Court's order is HT's argument of unfairness that, when all is said and done, it may distribute an amount greater than the \$17.1 million surplus funds it was found to have wrongfully retained. This is the theme HT attempts to carry throughout its Objection. However trying the circumstances HT must now confront, it made distributions with knowledge of the Intervenor's appeal to the Court for review of the presiding officer's interpretation that he lacked authority to order payment to former members as either restitution or disgorgement. HT distributed shares of the \$17.1 million surplus funds to certain members when it was fully aware there was a disputed claim as to the appropriate universe of potential recipients. Further, it made distributions knowing that it may suffer liability if, as here, before a final decision by the Court that did anything other than affirm the presiding officer's Order completely. Here, proportionate shares of the \$17.1 million surplus funds may not have reached the appropriate universe of recipients. HT could have submitted the funds to the forum, Secretary of State, in an interpleader-like action or could have held the funds in escrow. This it did not do. The universe of potential recipients should not be penalized for the choices HT made when it was determined that HT violated RSA chapter 5-B and knew the issue of the universe of potential recipients was not final. Otherwise, in this case, a violator of RSA chapter 5-B would be granted partial immunity from liability.

#### **IV. CONCLUSION**

The New Hampshire Supreme Court specifically found the presiding officer had committed an error of law when he determined that he did not have authority to include former members in the distribution of the \$17.1 million surplus funds. Therefore, the Court "vacate[d] the presiding officer's decision and remand[ed] for further proceedings," *Appeal of Town of Salem*, \_\_ N.H. at \_\_, 133 A.3d at 602, to resolve the issue of who should receive what portion of the \$17.1 million surplus funds. The determination of who should receive what amount cannot be resolved through a settlement agreement that, beyond HT and the BSR, reaches only to eight former members, as they do not constitute the entire universe of potential recipients who may be due a proportionate share.

For the foregoing reasons, the BSR's Motion is granted. Any arguments raised by the parties that were not specifically addressed are properly disposed of by this Order, as the presiding officer finds sufficient basis to allow the presentation of evidence to satisfy the purpose of the remand.

Therefore, the presiding officer orders as follows:

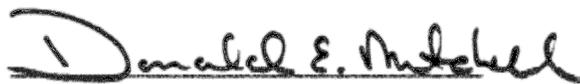
### **ORDER**

On June 13, 2016, a final scheduling hearing will be conducted beginning at 2 p.m. at a specific location in Concord to be later determined.

For planning purposes counsel should be advised that it is the presiding officer's intent to conduct the evidentiary hearing granted by this Order as soon as practicable.

In further order, the presiding officer acknowledges that no party has disputed or contested that PLT has repaid the \$17.1 million as required. PLT has expressed its intent to move for dismissal from these proceedings. The presiding officer hereby releases PLT from attendance from these instant proceedings, pending its submission of a formal motion for dismissal.

So ordered this 3<sup>rd</sup> day of June, 2016.



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

#### **SERVICE LIST**

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