

STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

IN THE MATTER OF:)

Local Government Center, Inc., et al.)

RESPONDENTS)

C-2011000036

HEALTHTRUST’S MOTION TO EXCLUDE EVIDENCE

HealthTrust, Inc. (“HealthTrust”) moves to exclude the admission of new evidence, including the Statement of Stipulated Facts, during the hearing on the merits of this remanded proceeding. In support of its motion, HealthTrust represents the following:

1. HealthTrust complied with the Scheduling Order dated June 17, 2016 by providing financial data and calculations to the Intervenors and the New Hampshire Bureau of Securities Regulation (“BSR”), and submitting a Statement of Stipulated Facts. However, HealthTrust has objected to the relevance and admissibility of issues other than whether HealthTrust should be required to make payments to the Intervenors as former HealthTrust members since the commencement of the remand. *See* HealthTrust’s Objection to BSR’s Motion to Establish Standing and Define Issues on Remand.

2. This matter is before the Presiding Officer solely because when the Intervenors appealed the Presiding Officer’s Order ruling that they, eight municipalities that identified themselves as former HealthTrust members, were not entitled to share in HealthTrust’s distribution of the \$17.1 million, the New Hampshire Supreme Court found that “to the extent the presiding officer concluded that he lacked the authority to penalize a violation of RSA 5-B:5, I(c) by ordering payment to former members of a pooled risk pool management program as

either restitution or disgorgement, he committed an error of law.” *Appeal of Town of Salem*, 168 N.H. 572, 581 (2016).

3. The Supreme Court correctly described the only issue presented in the Intervenor’s appeal as follows:

During that proceeding, the [Intervenor] were permitted to intervene in order to be heard on their proposal to participate, as former members of Health Trust, in the further distribution of approximately \$17.1 million in excess funds. Their motion proposing such a distribution was denied, and the [Intervenor] now appeal.

Id. at 576. The Supreme Court also affirmed that the issues raised by the BSR in the administrative proceeding had been resolved. *Id.* at 575-76.

4. When the Supreme Court remanded the matter for the Presiding Officer to consider the Intervenor’s claim pursuant to the correct legal standard, the Court did not direct the Presiding Office to engage in additional fact-finding or to conduct an evidentiary hearing. *Id.* at 581. When a proceeding is remanded for further proceedings, “[t]he scope of the remand is limited by the nature of the error or issue identified.” *Kalil v. Town of Dummer ZBA*, 155 N.H. 307, 312 (2007). “[T]he trial court cannot adjudicate a right not within the scope of the remand even though it may be one that the appellate court might have directed.” *Williams v. Babcock*, 121 N.H. 185, 194 (1981).

5. An agency “is bound by the mandate of an appellate court on remand.” *Auger v. Town of Strafford*, 158 N.H. 609, 612 (2009). It “is barred from acting beyond the scope of the mandate, or varying it, or [quasi-]judicially examining it for any other purpose other than execution.” *Id.* at 613 (quotation omitted). Limiting the scope of a remanded matter applies equally to administrative proceedings. *See Scarborough v. R.T.P. Enterprises, Inc.*, 120 N.H. 707, 709 (1980). Remand is not an opportunity for parties or entities that were not parties to the

administrative proceeding or the Intervenors' appeal to present new evidence or to advance new claims. *See Kalil*, 155 N.H. at 312; *Scarborough*, 120 N.H. at 709.

6. The Supreme Court found that the only issue before it regarding the administrative appeal was the Intervenors' "proposal to participate, as former members of Health Trust, in the further distribution of approximately \$17.1 million in excess funds." *Id.* at 576. Accordingly, the error of law found by the Supreme Court related only to the Intervenors' claims as former HealthTrust members. *Id.* at 581 ("Thus, to the extent the presiding officer concluded that he lacked the 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.").

7. In his Interim Order Following Remand ("Interim Order"), the Presiding Officer incorrectly described the scope of the remand as broader than the mandate from the Supreme Court. Instead of finding that the remand involves only the Intervenors' claims as former HealthTrust members, the Presiding Officer described the scope of the mandate as follows: "to resolve the issue of who should receive what portion of the \$17.1 million surplus funds." Interim Order, p. 5. The Presiding Officer's description of the remand is broader and inconsistent with the Supreme Court's mandate. *Appeal of Town of Salem*, 168 N.H. at 581.¹

8. There was no claim on behalf of current HealthTrust members before the Supreme Court involving the distribution of the \$17.1 million. The matter was before the Supreme Court only because "the [Intervenors] were permitted to intervene in order to be heard

¹ The Intervenors' aggregate claim is \$278,578. In contrast, the BSR seeks a penalty of \$2,307,982.29; \$1,036,542.30 on behalf of current HealthTrust members; and \$1,271,439.99 on behalf of former HealthTrust members. "Current member" means an entity was a HealthTrust member when the \$17.1 million was distributed. Current HealthTrust members participated in the distribution of the \$17.1 million in proportion to their healthcare and dental contributions to HealthTrust during fiscal year 2014.

on their proposal to participate, *as former members of Health Trust*, in the further distribution of approximately \$17.1 million in excess funds.” *Id.* at 576. Additionally, the Intervenor had made clear that they were advocating claims only for themselves as former HealthTrust members and the amount of the Intervenor’s claim was plainly stated and known to all parties, \$278,578.

9. For the reasons stated herein and in HealthTrust’s contemporaneously filed motion for summary judgment with incorporated memorandum of law, the Presiding Officer’s receipt of new evidence, including the Statement of Stipulated Facts, would be inconsistent with the Supreme Court’s mandate, and therefore, improper. *See Auger*, 158 N.H. at 613.

Accordingly, such evidence, including the Statement of Stipulated Facts and the exhibits thereto, should be excluded from evidence during the hearing scheduled for September 8 and 9, 2016.

WHEREFORE, HealthTrust respectfully requests that the Presiding Officer:

- A. Grant HealthTrust’s Motion to Exclude Evidence; and
- B. Grant such additional relief as justice requires.

Respectfully submitted,
HEALTHTRUST, INC.
By Its Attorneys,

Dated: August 5, 2016

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CERTIFICATE OF SERVICE

I certify that I have forwarded copies of this pleading to counsel of record via email.

/s/ Michael D. Ramsdell
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