

STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

IN THE MATTER OF:)

Local Government Center, Inc., et al.)

RESPONDENTS)

C-2011000036

PROPOSED ORDER SUBMITTED BY HEALTHTRUST

On September 8, 2016, the Presiding Officer commenced a hearing in this matter following the New Hampshire Supreme Court’s decision in which the Court found that the Presiding Officer had committed an error of law during the administrative proceeding. The error involved the Presiding Officer’s denial of a motion filed by the Intervenors, eight municipalities that sought to participate, as former HealthTrust members, in a September 2014 distribution of \$17.1 million that the Presiding Officer had ordered Property-Liability Trust, Inc. (“PLT”) return to HealthTrust, Inc. (“HealthTrust”) and HealthTrust distribute as surplus pursuant to RSA 5-B.

The Supreme Court stated the only issue presented in the Intervenors’ appeal as follows:

During that proceeding, the [Intervenors] 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 [Intervenors] now appeal.

Appeal of Town of Salem, 168 N.H. 572, 576 (2016). The Supreme Court specifically 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.” *Id.* at 581.

During the administrative proceeding, the Intervenors made an aggregate claim for \$278,578 of the \$17.1 million distribution. The New Hampshire Bureau of Securities Regulation

(“BSR”) took no position on the Intervenor’s claim that they, as former HealthTrust members, should participate in the disbursement of the \$17.1 million. The BSR did not seek a penalty as restitution or disgorgement from HealthTrust in excess of the \$17.1 million HealthTrust received from PLT. However, following the Intervenor’s appeal and after the commencement of the remanded proceeding, the BSR moved for an order directing HealthTrust to pay 74 former and current HealthTrust members,¹ including the Intervenor, an aggregate amount of \$2,307,982.29. The \$2.3 million is in addition to the \$17.1 million disgorged by HealthTrust in September 2014.

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. *See Appeal of Town of Salem*, 168 N.H. at 581. Because of the limited scope of the Supreme Court’s mandate, the Presiding Officer did not receive new evidence. The Presiding Officer heard argument from the Intervenor, the BSR, and HealthTrust.

For the reasons set forth in detail below, the Presiding Officer finds and rules that no additional penalty shall be imposed against HealthTrust. In short, HealthTrust disbursed the entire \$17.1 million it received from PLT to its then-current members as disgorgement and restitution after seeking guidance from the Presiding Officer and the BSR. HealthTrust did not distribute the funds until after the BSR took no position on the Intervenor’s motion regarding their participation in the distribution as former HealthTrust members. When HealthTrust distributed the \$17.1 million, it did so consistent with the Orders issued in this proceeding and the BSR’s agreements with other RSA 5-B pooled risk management programs regarding the

¹ “Current member” means an entity was a HealthTrust member in September 2014 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.

distribution of surplus. Additionally, neither the Intervenor nor the BSR moved to stay HealthTrust's distribution of the funds.

THE MANDATE AND THE SCOPE OF THE REMAND

The New Hampshire Supreme Court succinctly described the relevant procedural history leading to the instant remand as follows:²

In the first of these consolidated appeals, the [Intervenors] appeal an order of the presiding officer of the New Hampshire Bureau of Securities Regulation (Bureau) denying their motion to share in the distribution of approximately \$17.1 million in excess earnings and surplus by one of the respondents, Health Trust, Inc. (Health Trust), in an administrative action brought by the Bureau . . .

In 2011, the secretary of state commenced an adjudicative proceeding prompted by a staff petition filed by the Bureau alleging that the administrative respondents had violated RSA chapters 5-B and 421-B. *See Appeal of Local Gov't Ctr.*, 165 N.H. at 797, 85 A.3d 388. The presiding officer issued an order on August 16, 2012 (the August 16 Order) ruling that the administrative respondents had violated several provisions of RSA chapter 5-B . . . The August 16 Order required that Health Trust and Property Liability Trust return excess funds of \$33.2 million and \$3.1 million, respectively, to those political subdivisions that were members of those programs on August 16, 2012. The August 16 Order also directed the Bureau and the administrative respondents to enter into an "agreed-upon plan" to distribute excess funds to members that had participated in the program at any time after June 10, 2010; however, if those parties failed to reach an agreement, the order required distribution only to Health Trust's and Property Liability Trust's current members. The parties failed to reach agreement, and the excess funds were ordered to be distributed to current members.

The administrative respondents appealed the August 16 Order to this court. *See Appeal of Local Gov't Ctr.*, 165 N.H. at 790, 793-94, 85 A.3d 388. We affirmed in part, vacated portions of the order not relevant here, and remanded for further proceedings. *See id.* at 809, 810, 814, 85 A.3d 388. Thereafter, the Bureau filed a motion for entry of default order against the administrative respondents alleging noncompliance with the August 16 Order. The issues related to that motion were resolved by a consent decree incorporated into the presiding officer's order. During that proceeding, the [Intervenors] 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 [Intervenors] now appeal.

² A detailed procedural history of the matter is attached to this Order as Exhibit A.

Appeal of Town of Salem, 168 N.H. 572, 574-76 (2016). The Supreme Court 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 Court vacated the Presiding Officer’s denial of the Intervenor’s proposal to participate, as former HealthTrust members, in the distribution of the \$17.1 million, finding 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. at 581. The matter was remanded for further proceedings. *Id.* By Order dated June 3, 2016, the Presiding Officer conceded that “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.” *Id.* at 2.

THE INTERVENORS’ AND THE BSR’S CLAIMS

During the administrative proceeding, the Intervenor made an aggregate claim for \$278,578 of the \$17.1 million distribution. The BSR took no position on the Intervenor’s claim that they, as former HealthTrust members, should participate in the disbursement of the \$17.1 million. The BSR did not seek a penalty as restitution or disgorgement from HealthTrust in excess of the \$17.1 million HealthTrust received from PLT. Now, the BSR seeks an order directing HealthTrust to pay 74 former and current HealthTrust members, including the Intervenor, an aggregate amount 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.

FINDINGS AND RULINGS

A. The Issue on Remand Is Limited to the Intervenor's Proposal to Participate in the Distribution of the \$17.1 Million as Former HealthTrust Members.

This matter is before the Presiding Officer solely because when the Intervenor's appealed the Presiding Officer's Order ruling that they, as former HealthTrust members, were not entitled to share in HealthTrust's distribution of the \$17.1 million, the Supreme Court found that he had committed an error of law. By the plain language of its decision, the Supreme Court found that the only issue before it regarding the administrative appeal was the Intervenor's "proposal to participate, **as former members of Health Trust**, in the further distribution of approximately \$17.1 million in excess funds." *Id.* at 576 (emphasis added).

The error of law found by the Supreme Court related only to the Intervenor's 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.") (emphasis added). The Supreme Court did not direct the Presiding Office to engage in additional fact-finding or to conduct an evidentiary hearing. *Id.*

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). 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.

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). While an agency may take action not inconsistent with the mandate and judgment of the Supreme Court, "[w]here, however, [the Court's] opinion conclusively determined the parties' rights, the [agency] has no discretion in implementing the mandate." *Id.*

Here, the plain language of the Supreme Court's decision unambiguously set forth the single issue on remand, whether the Intervenors, as former HealthTrust members, could have received payments as disgorgement or restitution. The error identified by the Supreme Court is narrow and well-defined: "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." *Appeal of Town of Salem*, 168 N.H. at 581 (emphasis added).

The claim advanced by the BSR on behalf of current HealthTrust members, whether they should have received a greater share of the \$17.1 distribution, is separate and distinct from the issue whether former HealthTrust members could have received payments as disgorgement or restitution. Current HealthTrust members are not former HealthTrust members. Current HealthTrust members participated in the \$17.1 million distribution. No political subdivision raised a claim, as a current HealthTrust member, about HealthTrust's September 2014 distribution of the \$17.1 million that it received from PLT. Consequently, claims on behalf of

current HealthTrust members are inconsistent with, and beyond the scope of, the remand. *See Kalil*. 155 N.H. at 312; *Scarborough*, 120 N.H. at 709.

Similarly, as explained in the succeeding section of this Order, claims asserted on behalf of former HealthTrust members other than the Intervenors were raised and resolved during the administrative proceeding, and subsequently not pursued during the Intervenors' appeal. As a result, those claims are not properly included in the issue for remand. Instead, those claims are inconsistent with, and beyond the scope of, the remand. *See Kalil*. 155 N.H. at 312; *Scarborough*, 120 N.H. at 709.

B. The BSR's Claims on Behalf of Current and Former HealthTrust Members Other Than the Intervenors Are Barred by Res Judicata and Have Been Waived.

In its decision remanding the matter to the Presiding Officer, the Supreme Court recognized that the issues raised by the BSR in the administrative proceeding "were resolved by a consent decree incorporated into the presiding officer's order." *Appeal of Town of Salem*, 168 N.H. at 575-76. The final paragraph of the Final Order on Remand plainly states:

All pending motions and objections of the parties are deemed withdrawn and the above captioned matter deemed concluded and no further proceedings are required subject to the provisions of the Omnibus Order dated August 4, 2014, that incorporated an agreement between the parties which, by its terms, shall continue in effect until July 24, 2015. **No further action by any party to these administrative proceedings shall be pursued as to all issues contained within the initial amended BSR petition dated September 2, 2011.**

Final Order on Remand, p. 2 (emphasis added).³

The BSR never challenged or appealed the Presiding Officers' rulings in the Omnibus Order or the Final Order on Remand, including the prohibition on pursuing issues contained in the Amended Petition. Count II of the BSR's Amended Petition expressly alleges the improper

³ The Omnibus Order and Final Order on Remand are described in greater detail Exhibit A, pp. 5-6.

subsidization of PLT's workers compensation pool. The BSR's prayer for relief in the Amended Petition seeks an order for **“the Respondents to pay restitution to current and past members of the 5-B Pools in the amount of all earnings and surplus funds and property interests illegally transferred by Respondents to LGC Parent and/or for subsidies improperly paid to the Workers Comp Pool.”** Amended Petition at p. 36 (emphasis added).⁴ Thus, the claims advanced by the BSR on behalf of current and former HealthTrust members were included in the Amended Petition and resolved by the Final Order on Remand.

Because the Final Order on Remand prohibits any party from further pursuit of any issue contained in the Amended Petition, res judicata bars the BSR from raising claims on behalf of current and former HealthTrust members other than the Intervenors upon remand of the Intervenors' claim. *See Kalil*, 159 N.H. at 730. The Supreme Court's finding that the issues raised by the BSR in the administrative proceeding “were resolved by a consent decree incorporated into the presiding officer's order[,]” *Appeal of Town of Salem*, 168 N.H. at 575-76, is final and binding regarding all issues raised by the BSR and all issues that could have been raised by the BSR. *In re C.M.*, 166 N.H. 764, 781 (2014). Additionally, issues not presented during the Intervenors' appeal are waived and untimely upon remand. *In re Nyhan*, 151 N.H. 739, 743 (2005); *Warren v. Town of East Kingston*, 145 N.H. 249, 252 (2000).

⁴ The genesis of PLT's transfer and HealthTrust's subsequent disbursement of the \$17.1 million is the Presiding Officer's finding that those funds represent the amount of the unlawful subsidization of the workers compensation risk pool.

C. It Would Be Unjust and Unreasonable to Penalize HealthTrust by Requiring It to Distribute Funds in Addition to the Previously Disgorged \$17.1 Million Because HealthTrust: (1) Sought Guidance from the Presiding Officer and the BSR Prior to Distributing the Funds; and (2) Distributed the \$17.1 Million Consistent with the Presiding Officer's Orders and the BSR's Approved Method for Distributing Surplus. Additionally, Neither the Intervenors nor the BSR Moved to Stay HealthTrust's Distribution of the Funds.

If the Presiding Officer had not made an error of law in failing to realize that the Intervenors, as former HealthTrust members, could have participated in the distribution of the \$17.1 million, the Intervenors would have received at least some of the \$278,587 they sought as disgorgement or restitution. Today, however, there are many reasons why it would be unfair and unreasonable to order HealthTrust to make additional distributions in excess of the \$17.1 million. Each individual reason could provide a basis to render an additional penalty against HealthTrust unjust and unreasonable. In total, the reasons plainly demonstrate that imposing an additional penalty against HealthTrust would be unjust and unreasonable.

Most importantly, although the Presiding Officer previously was highly critical of the manner in which LGC amassed surplus rather than returning it to its members, with regard to the disbursement of the \$17.1 million that HealthTrust received from PLT, HealthTrust engaged in conduct expressly designed to avoid violating RSA 5-B. HealthTrust sought the guidance of the Presiding Officer and the BSR prior to distributing the \$17.1 million. On June 3, 2014, HealthTrust filed the Termination Notice, thereby informing the Presiding Officer and the BSR that HealthTrust and PLT had terminated the Settlement Agreement that was the basis for the BSR's Default Motion.⁵

The Termination Notice also alerted the BSR that PLT would repay HealthTrust the \$17.1 million on June 6, 2014, and that:

⁵ A detailed description of the Termination Notice appears at Exhibit A, p. 3.

Subject to the Presiding Officer's and the BSR's approval, HealthTrust will distribute the \$17.1 million to its current members or another identified combination of current and former Health Trust members. Assuming the Presiding Officer's and the BSR's approval, HealthTrust will complete the distribution as soon as practicable.

Termination Notice, Section 5. During a hearing on June 9, 2014, HealthTrust explained that it was seeking guidance from the Presiding Officer and the BSR because it desired to avoid a dispute with the BSR and additional litigation:

HealthTrust has pled affirmatively to you that it wants to distribute the \$17.1 million dollars to its members or some other identifiable group, and the reason we put it that way quite frankly is because the August 16 Order^[6] with respect to the \$33.3 million dollar payment disbursement to a group of members had a group identified. We followed the order. We then got sued and that suit still remains by ten municipalities who claim that it shouldn't have been ordered that way, that it should have been distributed to members, former members, who contributed to that surplus, and quite frankly HealthTrust at this point has no desire to engage in a fight with the Bureau. It certainly doesn't want to do anything that the Presiding Officer is not in favor of regarding disbursement of that \$17.1 million and frankly would like to do its best to either avoid another lawsuit or an amendment to the ongoing lawsuit simply over the issue of where does the \$17.1 million get distributed.

Transcript of Hearing on Pending Motions ("Tr."), p. 27–28.

HealthTrust did not distribute the \$17.1 million until after the BSR took no position on the proposed distribution and the Presiding Officer denied the Intervenors' motion to participate in the distribution as former HealthTrust members. Then, HealthTrust distributed the \$17.1 million consistent with the terms of the August 16 Order. Moreover, HealthTrust distributed the funds consistent with the BSR's report to the Presiding Officer in which the BSR advocated that HealthTrust distribute the \$17.1 million only to current HealthTrust members, consistent with the BSR's agreements with two other pooled risk management programs, Primex and SchoolCare.⁷

⁶ The "August 16 Order" refers to the Final Order dated August 16, 2012. It is described in more detail at Exhibit A, p. 1.

⁷ The BSR agreement with SchoolCare acknowledged that SchoolCare had \$22 million in excess surplus as of the date of the agreement, April 25, 2012, but allowed SchoolCare to return that surplus over a three year period and

See Bureau of Securities Regulation's Report Pursuant to Order of August 16, 2012, pp. 2-3 ("Consistent with the Risk Pool Management Agreements that the Bureau entered into with Primex and SchoolCare, the LCG shall return the sum of \$47,800,000.00 to Members who participated in the HealthTrust Risk Pool after June 14, 2010 through the date of the Final Order.") (footnote omitted).⁸

Having been placed on notice that HealthTrust would distribute the \$17.1 million consistent with the August 16 Order, neither the Intervenor nor the BSR attempted to stay HealthTrust's distribution of the \$17.1 million to its current members. Thus, HealthTrust complied with the August 16 Order and made the required distributions to its members consistent with that Order, as well as the Presiding Officer's denial of the Intervenor's motion to participate, as former HealthTrust members, in the distribution.

In sum, when HealthTrust distributed the funds in September 2014, it did so consistent with the August 16 Order and the Presiding Officer's denial of the Intervenor's motion to participate, as former HealthTrust members, in the distribution. HealthTrust's distribution was consistent with the BSR's report to the Presiding Officer. The Consent Decree and Omnibus Order had resolved all of the BSR's claims on behalf of current and former HealthTrust members, with the exception of the Intervenor. The BSR had taken no position on the Intervenor's motion to participate, as former HealthTrust members, in the distribution.

only to members who continued to be members as of the date of each of the distributions in 2012, 2013 and 2014. Former SchoolCare members did not participate in the return, even if they contributed to the surplus. Similarly, the BSR agreement with Primex acknowledged that Primex had between \$16 to \$21 million in excess surplus as of the date of the agreement, March 23, 2012, but allowed Primex to return that surplus over a three year period and only to members who continued to be members as of the date of each of those distributions in 2012, 2013 and 2014. Former Primex members did not participate in the return, even if they contributed to the surplus.

⁸ The omitted footnote makes clear that the \$47.8 million the BSR wanted returned to current HealthTrust members included both the \$33.2 million found to be excess surplus and the \$17.1 million repayment to be received by HealthTrust from PLT. The total amount is less than the sum of the two lesser amounts because of a credit recommended by the BSR. *See* Exhibit A, p. 2.

When HealthTrust distributed the \$17.1 million, it knew that the total amount of the Intervenors' claims subject to appeal was \$278,578. Neither the BSR nor the Intervenors had sought to stay the distribution. The Final Order on Remand subsequently confirmed that there would be no further litigation involving any issue raised by the BSR during the administrative proceeding.

For these reasons, it would be unjust and unreasonable to further penalize HealthTrust by requiring it to make payments in excess of the \$17.1 million, and in particular to pay an amount greater than the \$278,578 sought by the Intervenors. As explained above, if not for the Presiding Officer's error of law, the Intervenors, as former HealthTrust members, would have participated in the distribution of the \$17.1 million. Indeed, had the Intervenors moved for a stay of a portion of the Final Order on Remand to require HealthTrust to retain \$278,578 of the \$17.1 million pending the Intervenors' appeal, the Presiding Officer would have granted the motion. If that had occurred, the Presiding Officer now would order HealthTrust to distribute the \$278,578 among the Intervenors. However, neither the Intervenors nor the BSR moved to stay a portion of the distribution and HealthTrust disbursed the entire \$17.1 million.

An administrative penalty is imposed to punish an entity that has violated a statute or regulatory rule. *See Appeal of Appeal of Town of Salem*, 168 N.H. at 581 (violation of RSA 5-B:5, I(c) could be penalized by ordering payment as restitution or disgorgement). In the August 16 Order, LGC was penalized for its RSA 5-B:5, I(c) violations through disgorgement and restitution, which included disbursement of the \$17.1 million HealthTrust received from PLT. Any error in HealthTrust's disbursement of the \$17.1 million, however, was not the product of a statutory violation. Because HealthTrust sought the guidance of the Presiding Officer and the BSR before distributing the funds and made the distribution consistent with the Orders in this

matter and the BSR's Report to the Presiding Officer, it would be unjust and unreasonable to further penalize HealthTrust. It has disgorged the entire \$17.1 million, including the \$278,578 sought by the Intervenors, and sought to comply with RSA 5-B:5, I(c) in doing so.

For the foregoing reasons, the Presiding Officer finds and rules that no additional penalty is imposed against HealthTrust.

Respectfully submitted,
HEALTHTRUST, INC.
By Its Attorneys,

Dated: September 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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EXHIBIT A TO PROPOSED ORDER SUBMITTED BY HEALTHTRUST
DETAILED PROCEDURAL HISTORY

In September 2011, the New Hampshire Secretary of State, through the BSR, brought an enforcement action against the Local Government Center pooled risk management programs (“LGC”), claiming, among other allegations, that LGC had not returned excess surplus to risk pool members as required by RSA 5-B:5. Following an administrative hearing, the Presiding Officer found that LGC violated RSA 5-B:5, I(c) by failing to “[r]eturn all earnings and surplus in excess of any amounts required for administration, claims, reserves, and purchase of excess insurance to the participating political subdivisions.” Presiding Officer’s Final Order dated August 16, 2012 (“August 16 Order”).

The August 16 Order required LGC to “distribute \$33.2 million from [HealthTrust] and \$3.1 million from [PLT] to political subdivisions that were members of the programs on August 16, 2012.” It required LGC to attempt to agree with the BSR on a plan to distribute the excess surplus funds “to the political subdivisions who participated in the programs at any time after June 14, 2010” The BSR and HealthTrust did not reach an agreement on the method of distribution. The August 16 Order also required PLT to re-pay HealthTrust \$17.1 million that the Presiding Officer found constituted an illegal subsidy of the workers compensation risk pool. HealthTrust was ordered to distribute the funds to the extent they constituted surplus to its members consistent with the terms of the August 16 Order.

When the BSR and HealthTrust did not reach an agreement regarding the distribution of the excess surplus, the BSR advised the Presiding Officer that the distribution it had been prepared to negotiate was one in which HealthTrust would distribute both the excess surplus found by the Presiding Officer and the \$17.1 million HealthTrust was to receive from PLT only to current HealthTrust members. *See* Bureau of Securities Regulation’s Report Pursuant to Order of August 16, 2012, pp. 2-3 (“Consistent with the Risk Pool Management Agreements that the Bureau entered into

with Primex and SchoolCare, the LGC shall return the sum of \$47,800,000.00 to Members who participated in the HealthTrust Risk Pool after June 14, 2010 through the date of the Final Order.”) (footnote omitted).¹ Because the parties did not reach an agreement, the August 16 Order required the return of the funds to HealthTrust and PLT members that participated in the respective risk pools “on the date of this order.”

LGC timely moved for a stay and reconsideration of the August 16 Order. Both motions were denied. LGC appealed the August 16 Order. LGC moved that the Supreme Court stay imposition of the August 16 Order. After LGC’s motion was denied, some of the Intervenors and other former LGC members moved to intervene in the appeal. The motion sought to interject into the appeal the Intervenors’ complaint that the August 16 Order directed LGC to distribute funds found to be excess surplus only to current, and not former, risk pool members. The Supreme Court denied the former members’ motions to intervene and for stay. *Appeal of the Local Government Center, Inc. & a.* (“*LGC Appeal*”), 165 N.H. 790, 797 (2014) (Order dated June 27, 2013).

On January 10, 2014, the Supreme Court vacated portions of the August 16 Order, including an award of attorneys’ fees. The Court remanded the case to the Presiding Officer for additional proceedings on that issue. *LGC Appeal*, 165 N.H. at 814. Before a hearing was held on the remanded issue, the BSR filed a Motion for Entry of Default (“Default Motion”) in which it claimed that certain post-August 16 Order conduct by HealthTrust and PLT violated the August 16 Order. The Default Motion included a challenge to HealthTrust’s receipt of the \$17.1 million from PLT and its distribution of the funds as directed by the August 16 Order.

¹ The omitted footnote makes clear that the \$47.8 million the BSR wanted returned to current HealthTrust members included both the \$33.2 million found to be excess surplus and the \$17.1 million repayment to be received by HealthTrust from PLT. The total amount is less than the sum of the two lesser amounts because of a credit recommended by the BSR.

On June 3, 2014, HealthTrust filed a Notice of Termination Terminating Settlement Agreement (“Termination Notice”) which informed the Presiding Officer and the BSR that HealthTrust and PLT had terminated the Settlement Agreement that had prompted the Default Motion. The Termination Notice provided that PLT would repay HealthTrust the \$17.1 million on June 6, 2014, and that:

Subject to the Presiding Officer's and the BSR's approval, HealthTrust will distribute the \$17.1 million to its current members or another identified combination of current and former Health Trust members. Assuming the Presiding Officer's and the BSR's approval, HealthTrust will complete the distribution as soon as practicable.

Termination Notice, Section 5. During a hearing on June 9, 2014, HealthTrust explained that it was seeking guidance from the Presiding Officer and the BSR because it desired to avoid a dispute with the BSR and additional litigation:

HealthTrust has pled affirmatively to you that it wants to distribute the \$17.1 million dollars to its members or some other identifiable group, and the reason we put it that way quite frankly is because the final order with respect to the \$33.3 million dollar payment disbursement to a group of members had a group identified. We followed the order. We then got sued and that suit still remains by ten municipalities who claim that it shouldn't have been ordered that way, that it should have been distributed to members, former members, who contributed to that surplus, and quite frankly HealthTrust at this point has no desire to engage in a fight with the Bureau. It certainly doesn't want to do anything that the Presiding Officer is not in favor of regarding disbursement of that \$17.1 million and frankly would like to do its best to either avoid another lawsuit or an amendment to the ongoing lawsuit simply over the issue of where does the \$17.1 million get distributed.

Transcript of Hearing on Pending Motions (“Tr.”), p. 27–28.

The Intervenors were allowed to intervene in the administrative proceeding solely to assert their claim that they, as former HealthTrust members that contributed to the \$17.1 million that was deemed to be an unlawful subsidy, were entitled to participate in HealthTrust’s distribution of the funds after they were received from PLT. *See* Order Granting Limited Intervenor Status dated June 25, 2014. On July 17, 2014, the Intervenors filed a motion proposing a manner in which to distribute the \$17.1 million (“Distribution Motion”). The

Intervenors urged the Presiding Officer that they, as former HealthTrust members, were entitled to share in the distribution.

The Intervenors had obtained records from HealthTrust that allowed them to calculate HealthTrust's total member contributions for the years 2003-2010, and therefore, a manner in which to calculate each Intervenors' individual proposed proportional share of the \$17.1 million distribution. Distribution Motion, ¶¶15-18. Thus, the Distribution Motion identified the aggregate amount of the distribution sought by the eight Intervenors, \$278,587, and the portion sought to be distributed to each of the eight Intervenors. *Id.*, ¶19.

On July 21, 2014, the Presiding Officer heard oral argument on the Distribution Motion. Omnibus Order dated August 4, 2014 ("Omnibus Order"), p. 3; Tr., pp. 7-33. During the hearing, the Presiding Officer confirmed that the only relief sought in the Distribution Motion was the Intervenors' \$278,587 claim. Tr., p. 29; *see also* Omnibus Order, 5 ("The intervenors do not represent any parties other than those eight municipalities named in their motion as amended."). The BSR took no position on the Intervenors' request as former members to share in the distribution. *Id.* at 3, 5; Tr., p. 12.

HealthTrust objected to the motion. *Id.* at 3, 5. HealthTrust argued that including the Intervenors as former HealthTrust members in the distribution would be inconsistent with the August 16 Order and the Risk Pool Practices Agreement(s) the BSR had entered into with other pooled risk management programs, Primex and SchoolCare. Tr., pp. 16-17. HealthTrust also argued that including the Intervenors as former HealthTrust members in the distribution would be inconsistent with the agreements the Intervenors entered into with LGC to voluntarily participate in the HealthTrust pooled risk management program. Tr., p. 16.

LGC's Application and Participation Agreement provides that HealthTrust members, like all members of the risk pools, "agree[] to be bound by the provisions of Local Government Center's Bylaws and any and all amendments thereto which are or may be duly adopted by Local Government Center from time to time." LApp., p. 18. The agreement also acknowledges the member's receipt of the LGC bylaws, LApp., pp. 18-19. The LGC bylaws expressly provide that a risk pool member or "Participant" that terminates or withdraws from membership in the risk pool shall have no right or claim to a return of excess surplus after the participant's termination or withdrawal:

(a) A Participant that is terminated or withdraws from one or more Trusts shall thereupon and at all times thereafter have no right to, or claim on, without limitation, any of the assets, income, distributions (whether past, present or future), reserves or property, whether or not then owned or after acquired, of the Trust from which it is terminated or withdraws.

(b) A Participant that is terminated or withdraws from LGC shall thereupon and at all times thereafter have no right to, or claim on, without limitation, any of the assets, income, distributions (whether past, present or future), reserves or property, whether or not then owned or after acquired, of LGC.

LApp., pp. 74, 98. The Presiding Officer denied the Distribution Motion and found that HealthTrust's distribution of the \$17.1 million shall be made only to "participating political subdivisions" and not to former HealthTrust members. Omnibus Order, p. 7.

On July 25, 2014, the BSR, HealthTrust and PLT entered into a Consent Decree regarding the Default Motion. The Omnibus Order incorporated and approved the Consent Decree. All issues presented in the BSR's Default Motion were resolved by the Consent Decree and the Omnibus Order. Omnibus Order, p. 4. The BSR and HealthTrust also waived all appeals from the enforcement proceeding. Consent Decree, p. 5. The only issue that remained pending after the Consent Decree and the Omnibus Motion was the amount of legal fees and costs to be paid the BSR pursuant to RSA 5-B:4-a, which subsequently was resolved.

On September 3, 2014, the Intervenors moved for reconsideration of the Omnibus Order. HealthTrust objected to the motion. The BSR did not respond to the motion, which was denied by Order dated September 8, 2014.² Neither the Intervenors nor the BSR moved to stay the Omnibus Order or HealthTrust's distribution of the \$17.1 million. On November 17, 2014, the Presiding Officer issued the Final Order on Remand, the final paragraph of which states:

All pending motions and objections of the parties are deemed withdrawn and the above captioned matter deemed concluded and no further proceedings are required subject to the provisions of the Omnibus Order dated August 4, 2014, that incorporated an agreement between the parties which, by its terms, shall continue in effect until July 24, 2015. No further action by any party to these administrative proceedings shall be pursued as to all issues contained within the initial amended BSR petition dated September 2, 2011.

Final Order on Remand, p. 2.

On October 8, 2014, the Intervenors appealed to the Supreme Court. The BSR did not file a motion or a brief asserting claims or joining in the relief sought by the Intervenors on behalf of other former HealthTrust members. The BSR did not participate in oral argument.

The New Hampshire Supreme Court vacated the Presiding Officer's denial of the Intervenors' Distribution Motion, finding 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. at 581. The Supreme Court remanded the decision for further proceedings. *Id.* By Order dated June 3, 2016, the Presiding Officer conceded that "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." *Id.* at 2.

² After the Motion for Reconsideration was denied, HealthTrust disbursed the \$17.1 million to current HealthTrust members, consistent with the August 16 Order and the denial of the Intervenors' motions.