

THE STATE OF NEW HAMPSHIRE

DEPARTMENT OF STATE

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)
IN THE MATTER OF:)
) C-2011000036
Local Government Center, Inc. et al)
)
_____)

**OBJECTION TO HEALTHTRUST’S MOTION FOR RECONSIDERATION
OF THE FINAL ORDER ADDRESSING REMAND**

Health trust’s motion for reconsideration advances four arguments in support of its claims of error:

- (1) The hearing officer erred when he failed to find that BSR waived a challenge to HT’s distribution of the \$17.1 million because HT failed to notify BSR of its distribution plan.
- (2) The hearing officer committed an error of law when he created a new “statutory right” rather than recognizing that he could penalize a statutory violation by ordering repayment to former HT members as restitution or disgorgement.
- (3) The hearing officer erred by expanding the scope of the remand beyond the \$278,578 originally demanded by the Intervenor, to the \$2,307,982.29 subsequently demanded by BSR.
- (4) The hearing officer erred by penalizing HT on remand after it had distributed \$17.1 million, consistent with the hearing officers order, despite the fact that BSR took no position on the Intervenor’s motion during the administrative proceeding or the Intervenor’s appeal.

Of these four arguments, only one concerns the Intervenor at all. The other three arguments exclusively relate to the question of whether political subdivisions that were similarly situated to the Intervenor, but which did not participate in the intervention proceedings, are

entitled to participate in the distribution won by the Intervenors. Argument number (1) concerns whether BSR waived its rights while the Intervenors litigated. Argument number (3) expressly excludes the Intervenors from its reach because it concerns expansion of the question beyond the Intervenors. Argument number (4) also expressly excludes the Intervenors, because the argument concerns BSR's failure to take a position supporting the Intervenors while the Intervenors were litigating the question of entitlement to be considered for a refund.

The Intervenors take no position as to these arguments between the BSR and HT, except to note that the Intervenors, through counsel, have been expending resources both in this proceeding and in court, a fact recognized throughout HT's pleadings. Simply stated, HT expressly recognizes that the Intervenors' position was presented, preserved, and is the subject of the Appeal. The Intervenors take no position on whether BSR presently has the right to be considered as part of the universe of potential refund recipients. Likewise, the Intervenors take no position on whether the hearing officer's determination that previously excluded political subdivisions other than the Intervenors should receive such a refund. Those controversies are between BSR and HT and do not concern the Intervenors.

Argument (2) simply represents an incorrect reading of the hearing officer's Order. HT argues that the hearing officer incorrectly understood the Supreme Court's decision in Appeal of Town of Salem, 168 N.H. 572 (2016), as "creating a statutory right for former risk pool members to share in a distribution of surplus." HT Motion for Recon. at 11. The content of the Order makes it abundantly clear that the hearing officer did not interpret either the Supreme Court's decision, or RSA 5-B, in the manner suggested by HT. HT takes several sections of the Order out of context and cherry picks portions of text in an effort to create the illusion that the hearing

officer was unaware of the law and his responsibilities on remand. HT's efforts to should be rejected.

Taken as a whole, it is abundantly clear that the hearing officer was both aware of, and properly applied, the legal authority defined by the statute and the Supreme Court. Further, as to the Intervenors, the hearing officer's exercise of the discretion set out in the statutory scheme was reasonably applied.

The Order reflects that the hearing officer clearly understood his authority to order the payment of funds from HT to the Intervenors. HT's claim that the hearing examiner applied a new "statutory right" to the distribution of illegally retained funds misconstrues the Order. The hearing officer wrote that "the court's decision gives breath to all political subdivisions now determined to have a statutory right to receive a proportionate share of the illegal amount of subsidy....made by HT." HT Motion to Recon at 11. Contrary to HT's claims, this statement does not suggest that the hearing officer believed he was required by the statute to provide a refund. Rather, it simply indicates that the hearing officer recognized, *within the context of his prior orders*, that the statute properly put the Intervenors in the possible universe of refund recipients. Likewise, the hearing officer's reference to members' "express rights of restitution provided for in RSA chapter 5-B," cannot be read in isolation from the rest of litigation. Rather, it must be read within the context of the prior orders in this case in which the hearing examiner had already ordered restitution under the statute.

The hearing examiner's Order makes its clear that, contrary to HT's claims, he clearly understood the range of discretion provided under the statutory scheme, as interpreted by the Supreme Court. For example, the hearing officer wrote that, "[t]he interpretation of RSA chapter

5-B made by the Court following appeal results in an expansion of the number of political subdivisions eligible to receive restitution from HT.” Order at 8. The reference to the number of municipalities “eligible” to receive restitution clearly reflects an understanding that these municipalities did not have a statutory “right” to receive restitution.

The hearing officer also wrote that “the Court’s decision was that funds could be distributed to former members of HT on the authority found in RSA 5-B:4-a.....” Order at 11. The hearing officer did not write that the Court decided what funds must be distributed. This clearly shows that the hearing officer understood both the existence of the universe of potential recipients and his discretion in determining the proper remedy under the statute.

In discussing the scope of the remand, the Court wrote that the question resolved on the appeal concerned the hearing examiner’s earlier “interpretation of the statute’s intent as to the universe of potential recipients.” Order at 13. The hearing examiner thus clearly understood that the question concerned the potential claimants, not the universe of claimants who were somehow “statutorily required” to receive a refund.

Further, the hearing examiner expressly recognized the issue identified by HT. Discussing the Supreme Court decision, the hearing examiner wrote that, “[t]he 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.’” Order at 14. This quote clearly reflects the hearing officer’s understanding that the Supreme Court was describing the scope of his permissible authority, and not directing the outcome of the administrative litigation.

Thus, taken as a whole, it is clear that the hearing officer did not issue the Order under a misimpression of his legal authority or an exercise of unreasonable justice. HT's motion for reconsideration should be denied.

RESPECTFULLY SUBMITTED
The Towns of Auburn, Bennington,
Meredith, Northfield, Peterborough,
Plainfield, Salem, and Temple,
By their attorneys,
DOUGLAS, LEONARD & GARVEY, P.C.

November 11, 2016 /s/Richard J. Lehmann
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CERTIFICATION

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

November 11, 2016 /s/Richard J. Lehmann
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