

STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

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

**MEMORANDUM OF LAW IN SUPPORT OF HEALTHTRUST'S
MOTION TO DISMISS BSR'S MOTION FOR ENTRY OF DEFAULT ORDER
FOR LACK OF JURISDICTION**

HealthTrust, Inc. ("HealthTrust") submits this memorandum of law in support of its contemporaneously filed motion to dismiss the New Hampshire Bureau of Securities Regulation's ("BSR") Motion for Entry of Default Order ("Motion") for lack of jurisdiction. In sum, the Presiding Officer should dismiss the Motion for lack of jurisdiction because the allegations in the Motion: (1) involve only conduct that occurred more than a year after the Final Order, dated August 16, 2012 ("Final Order"); and therefore, (2) must be adjudicated through a new administrative proceeding because neither RSA 5-B:4-a nor RSA 421-B:26-a authorizes a Presiding Officer to exercise jurisdiction: (i) over post-Final Order conduct; or (ii) for the purpose of enforcing the Final Order.

JURISDICTIONAL ALLEGATIONS

Prior Proceedings

In September 2011, the BSR filed a petition with the New Hampshire Secretary of State ("Secretary") charging Respondents with violations of RSA 5-B and RSA 421-B. (Motion ¶1). After a ten-day hearing, on August 16, 2012, the Presiding Officer found that Respondent entities had violated certain requirements determined to be found in RSA 5-B. (Motion ¶2). After moving for, and being denied, reconsideration of the Order, Respondents appealed to the New Hampshire Supreme Court. (Motion ¶2).

On January 10, 2014, the Court issued its opinion on the appeal. (Motion ¶3); *Appeal of Local Government Center, Inc. & a.*, No. 2012-729 (N.H. January 10, 2014). The Court affirmed the directive in the Final Order that Local Government Center Property-Liability Trust, LLC (“LGCPLT”) or a successor entity repay HealthTrust \$17.1 million by December 1, 2013.¹ (Motion ¶¶7-8). The Court also vacated portions of the Final Order and remanded the matter for the purpose of determining the amount of legal fees to be paid by Respondents to the BSR. (Motion ¶3).

Reorganization of HealthTrust and PLT

The Final Order required that “[n]o later than 90 days from the date of this Order, [Local Government Center] shall organize its two pooled management programs into a form that provides each program with an independent board and its own set of written bylaws.” (Final Order at 73; Motion ¶4). Consistent with this directive, in November 2012, Local Government Center HealthTrust, LLC (“LGCHT”) and LGCPLT adopted separate bylaws and appointed separate boards of directors. (Motion ¶11a). On September 1, 2013, LGCHT transferred its assets and liabilities to HealthTrust, which had its own Board of Directors and bylaws. (Motion ¶11b). That same day, LGCPLT transferred its assets and liabilities to Property-Liability Trust, Inc. (“PLT”), which had its own by-laws and Board of Directors. (Motion ¶11c).

HealthTrust and PLT Agreement

On October 28 and 29, 2013, HealthTrust and PLT executed an agreement (“Agreement”; Exhibit A to Motion [“Ex. A”]) wherein the terms of the agreement would become operative only in the event that the New Hampshire Supreme Court ruled against Respondents on the then-pending appeal of the \$17.1 million repayment provision of the Final Order. (Motion ¶¶12-13,

¹ The Supreme Court stayed this part of the Final Order pending its decision in the appeal. *Appeal of the Local Government Center*, Order entered October 23, 2013.

Ex. A). Pursuant to the Agreement, if Respondents received an adverse ruling on that point, PLT's assets and liabilities would be transferred to HealthTrust in satisfaction of the \$17.1 million that PLT was ordered to pay HealthTrust in the Final Order. (Motion ¶12, Ex. A).

On January 10, 2014, the date of the Supreme Court opinion, the Agreement became both operative and public. (Motion ¶13). The Motion alleges that, on February 4, 2014, attorneys for HealthTrust and PLT met with the BSR and advised it that: (1) HealthTrust was conducting the run off of PLT's property-liability and worker's compensation lines; and (2) while PLT continues to exist as a corporation, it is completely under HealthTrust's control. (Motion ¶16).²

The BSR'S Claims

The BSR alleges that HealthTrust and PLT "violated the Final Order and RSA ch. 5-B by their conduct." (Motion ¶21). The conduct to which the BSR refers is the Agreement and "the transfers made thereunder." (Motion ¶¶23-25). The Agreement was executed in October 2013, and the transfers occurred on or after January 10, 2014, when the Agreement became operational. (Motion ¶ 13, Ex. A). The BSR seeks an order finding HealthTrust and PLT in violation of the Final Order and RSA 5-B, and finding that they shall cease and desist their violations of the Final Order and RSA 5-B or be deemed disentitled from operating RSA 5-B risk pools and claiming the protections of RSA 5-B:6. (Motion - Prayers for Relief A and B).

The BSR entitled the Motion, "Motion for Entry of Default Order." More recently, the BSR more aptly referred to the Motion as "the Motion to Enforce filed in this matter." (Motion to Clarify Scheduling Order and Notice of Hearing Regarding Issue of Jurisdiction, p. 1).

² The Presiding Officer must accept the allegations as true for the purpose of HealthTrust's motion to dismiss. While the Presiding Officer should not reach the merits of the Motion, at such a proceeding, HealthTrust would produce evidence that it informed the BSR that PLT, supervised by its own board, remained in existence and that PLT's board could supervise HealthTrust's compliance with the terms of the Agreement.

MOTION TO DISMISS STANDARD OF REVIEW

“The standard of review in considering a motion to dismiss is whether the plaintiff’s allegations are reasonably susceptible of a construction that would permit recovery.” *Beane v. Dana S. Beane & Co., P.C.*, 160 N.H. 708, 711 (2010). “[T]he court [or quasi-judicial officer] must determine whether the facts as pled are sufficient under the law to constitute a cause of action.” *Jay Edwards, Inc. v. Baker*, 130 N.H. 41, 44, (1987) (citations omitted). “This threshold inquiry involves testing facts alleged in the pleadings against the applicable law.” *Beane*, 160 N.H. at 711. “Dismissal is warranted if the writ’s allegations do not constitute a basis for legal relief.” *J&M Lumber & Constr. Co., Inc. v. Smyjunas*, 161 N.H. 714, 724 (2011). These standards apply to the question presented here: whether the BSR’s Motion sets forth a claim within the Presiding Officer’s jurisdiction over the above-captioned administrative proceeding.

Although “in ruling on a motion to dismiss, all facts properly pleaded by the plaintiff are deemed true, and all reasonable inferences derived therefrom are construed most favorably to the plaintiff,” *Jay Edwards, Inc.*, 130 N.H. at 45, (quotations omitted), a quasi-judicial officer “need not accept statements in the [petition or motion] which are merely conclusions of law.” *See Beane*, 160 N.H. at 711 (quotations omitted). The quasi-judicial officer also may consider documents submitted with the plaintiff’s pleadings, documents referenced in plaintiff’s complaint, documents about which the authenticity is undisputed, and documents of public record. *Id.*

ARGUMENT

THE PRESIDING OFFICER LACKS JURISDICTION OVER THE MOTION BECAUSE THE CONDUCT AT ISSUE OCCURRED MORE THAN A YEAR AFTER THE FINAL ORDER, AND NEITHER RSA 5-B NOR RSA 421-B:26-a AFFORDS HIM JURISDICTION OVER POST-FINAL ORDER CONDUCT OR TO ENFORCE THE FINAL ORDER.

The Motion seeks administrative remedies in response to the Agreement and the transfer of PLT's assets and liabilities to HealthTrust pursuant to the Agreement. HealthTrust and PLT entered into the Agreement in October 2013. The Agreement became operational on January 10, 2014, when the New Hampshire Supreme Court affirmed the provision of the Final Order that required PLT to repay \$17.1 million to HealthTrust. The Motion should be dismissed for lack of jurisdiction because neither RSA 5-B:4-a nor RSA 421-B:26-a authorizes the Presiding Officer to exercise jurisdiction over conduct that occurs after an administrative proceeding has concluded or for the purpose of enforcing the Final Order. Rather, HealthTrust's and PLT's post-Final Order conduct must be addressed through a new petition and administrative proceeding pursuant to RSA 5-B:4-a, I, VI.

A. Neither RSA 5-B:4-a nor RSA 421-B:26-a extends the Presiding Officer's jurisdiction to conduct that occurs after the Final Order or for the purpose of enforcing the Final Order.

“Administrative agencies are granted only limited and special subject matter jurisdiction.” *In re Campaign for Ratepayers' Rights*, 162 N.H. 245, 250 (2011) (*quoting Appeal of Amalgamated Transit Union*, 144 N.H. 325, 327 (1999)). An agency's jurisdiction “is dependent entirely upon the statutes vesting the agency with power and the agency cannot confer jurisdiction upon itself.” *Id.* (brackets and citation omitted). “Furthermore, a tribunal that exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under

the precise circumstances and in the manner particularly prescribed by the enabling legislation.”
In re Campaign for Ratepayers’ Rights, 162 N.H. at 250 (quotation and citation omitted).

Agencies and administrative tribunals lack the equitable jurisdiction afforded to the superior court pursuant to RSA 491:7. *See id.*; *Appeal of Land Acquisition*, 145 N.H. 492, 498 (2000), *superseded by statute as stated in Appeal of Hardy*, 154 N.H. 805 (2007) (“While a court may have [certain] inherent authority . . . the same is not true for a quasi-judicial administrative body.”). Because agencies or tribunals lack equitable jurisdiction, they possess “only the authority that is ‘expressly granted or fairly implied by statute.’” *In re Chase Home for Children*, 155 N.H. 528, 533 (2007) (*quoting Appeal of Public Serv. Co. of N.H.*, 130 N.H. 285, 291 (1988)). Consequently, the remedial authority of an administrative agency or tribunal also “is expressly limited by statute.” *In re Campaign for Ratepayers’ Rights*, 162 N.H. at 255 (*quoting Appeal of Land Acquisition*, 145 N.H. at 498).

The New Hampshire Supreme Court has curtailed an agency’s over-reaching when the legislature did not provide jurisdictional authority for the relevant action. For example, while a Department of Health and Human Services (“DHHS”) hearing panel is authorized to establish residential rates for service providers and to determine the effective dates of the rates, the panel lacks the authority “to order DHHS to make retroactive payments at the recalculated rate levels.” *In re Chase Home for Children*, 155 N.H. at 534. Similarly, the Board of Tax and Land Appeals may award costs in a property tax abatement appeal, but it lacks the statutory authorization to award attorney’s fees in such cases. *Appeal of Land Acquisition*, 145 N.H. at 497-98.

In *E.D. Swett, Inc. v. N.H. Commission for Human Rights*, 124 N.H. 404 (1983), the New Hampshire Supreme Court considered whether the Human Rights Commission (“HRC”) possessed the authority to award compensatory damages and attorney’s fees to a prevailing

complainant and determined that it did not have such authority. The Court ruled such authority did not exist even though it “agreed that awards of compensatory damages and counsel fees would be consistent with effectuating the elimination and prevention of discrimination.” *Id.* at 411. Similarly, the Court recognized that the relevant statute, RSA 354-A:9, expressly authorized the HRC to award equitable types of relief. *Id.* at 412. Nonetheless, the Court found that the legislature had not provided the HRC with the authority to award compensatory damages as follows:

We decline to hold that this statute enlarges the commission’s authority so as to encompass other forms of relief such as compensatory damages. Notwithstanding the fact that other jurisdictions have interpreted identical or similar provisions as allowing compensatory damages, we prefer to await a more express indication from the legislature that its intent is indeed to authorize the commission to award compensatory damages.

Id.

Here, the relevant statutes are RSA 5-B:4-a and RSA 421-B:26-a. RSA 5-B:4-a, I(a) authorizes the Secretary “[t]o bring administrative actions to enforce [RSA ch. 5-B].” The Secretary “shall have all powers specifically granted or reasonably implied in order to perform the substantive responsibilities imposed by [RSA ch. 5-B].” RSA 5-B:4-a, II. RSA 5-B:4-a, VI expressly and unequivocally states the action available to the Secretary if he believes a person or entity has violated an order issued pursuant to RSA ch. 5-B as follows:

Whenever it appears to the secretary of state that any person has engaged or is about to engage in any act or practice constituting a violation of this chapter or any rule **or order under this chapter** the secretary of state shall have the power to issue and cause to be served upon such person an order requiring the person to cease and desist from violations of this chapter. (emphasis added).

RSA 5-B:4-a, VI. The statute does not provide an alternative means of addressing a suspected violation of RSA ch. 5-B. *See id.*

If the Secretary issues a cease and desist order, it “shall be calculated to give reasonable notice of the rights of the person to request a hearing on the order and shall state the reasons for the entry of the order.” RSA 5-B:4-a, VI. “All hearings shall be conducted in accordance with RSA 421-B:26-a.” *Id.* RSA 421-B:26-a, I authorizes the Secretary to appoint a presiding officer to conduct the adjudicatory proceeding. The detailed and comprehensive statute expressly authorizes a presiding officer to undertake any of the following acts:

- (a) Schedule and hold hearings.
- (b) Administer oaths and affirmations.
- (c) Issue subpoenas on behalf of the state.
- (d) Determine the order of proof in any proceeding.
- (e) Receive relevant evidence and rule on offers of proof in hearings.
- (f) Take judicial notice of any facts which are of common knowledge and general notoriety.
- (g) Take, or cause to be taken, depositions.
- (h) Regulate and control the course of an administrative hearing.
- (i) Hold conferences for the settlement or simplification of issues, or for obtaining stipulations as to issues of fact or proof by consent of the parties.
- (j) Dispose of procedural requests, including adjournments or continuances at the request of the parties or on the presiding officer's own motion.
- (k) Interview and examine witnesses and parties as the case may require.
- (l) Direct parties to appear at hearings.
- (m) Consider and evaluate the facts and evidence on the record in making findings of fact and conclusions of law and dispositions.
- (n) Determine credibility or weight of evidence in making findings of fact and conclusions of law.
- (o) Render oral and written decisions, reports, or recommendations as authorized by statute or rule.

(p) Take any action in a proceeding necessary to conduct and complete the case, consistent with applicable statutes, rules, and precedents.

RSA 421-B:26-a, XIV.

RSA 421-B:26-a, XIV does not authorize a presiding officer to exercise jurisdiction over conduct that occurs after an administrative proceeding has concluded. Nor does it authorize a presiding officer to enforce a final order. *See id.* Instead, a presiding officer's post-final order jurisdiction is limited to specific conduct related to a motion for reconsideration of a final order. *See* RSA 421-B:26-a, XXVII. Such a limitation on a presiding officer's jurisdiction is consistent with the express grant of jurisdiction "*to conduct and complete the case.*" RSA 421-B:26-a, XIV(p) (emphasis added).

When the legislature did not extend a presiding officer's jurisdiction to post-final order conduct or enforcement of the final order, it acted consistent with RSA 5-B:4-a, IV. A presiding officer may subpoena witnesses or order the production of documents to the adjudicatory proceeding. RSA 5-B:4-a, III. However, neither the Secretary nor a presiding officer possesses the authority to enforce a subpoena or an order to produce documents. *See* RSA 5-B:4-a, IV. Rather, enforcement authority requires a separate proceeding as follows:

In the event that a person refuses to obey a subpoena issued to him or her or any order or determination the secretary of state is authorized to make, the superior court, upon application by the attorney general or secretary of state or any officer designated by the secretary of state, may issue to the person an order directing him or her to appear before the attorney general or secretary of state, or the officer designated by him or her, to produce documentary evidence if so ordered or to give evidence relative to the matter under investigation or in question.

RSA 5-B:4-a, IV.

The legislature's choice to restrict a presiding officer's jurisdiction is consistent with the jurisdictional restrictions imposed on the Public Employee Labor Relations Board ("PELRB").

In *Appeal of Somersworth School District*, 142 N.H. 837 (1998), the New Hampshire Supreme Court recognized that “the PELRB has been given broad subject matter jurisdiction to determine and certify bargaining units to enforce the provisions of [RSA chapter 273-A].” *Id.* at 841 (quotations and citations omitted). The PELRB’s jurisdictional grant, however, is limited “to those matters specifically encompassed within the statute.” *Id.* Thus, the PELRB may issue cease and desist orders. *Id.* However, RSA ch. 273-A “does not give [the PELRB] the ability to grant all equitable remedies. *See id.* Instead, a separate proceeding is required because “the PELRB must petition [the] superior court for an injunction if needed to compel compliance with an order.” *Id.* (citing RSA 273-A:7).

Unlike the PELRB, the Secretary is not required to invoke the jurisdiction of the superior court if he believes a person or entity is violating or is about to violate an order issued pursuant to RSA ch. 5-B. However, the Secretary, let alone the BSR, cannot simply request that the presiding officer from a previous proceeding address post-proceeding conduct. The statutory scheme requires that the Secretary initiate a separate proceeding: that is, a new administrative action or a properly issued and served new cease and desist order. *See* RSA 5-B:4-a, I, VI.

B. The Supreme Court’s remand order was specifically limited to a single issue and did not extend the Presiding Officer’s jurisdiction to post-Final Order conduct or enforcement of the Final Order.

When the New Hampshire Supreme Court vacated part of the Final Order and remanded the case for further proceedings, it was specific in the scope of the remand. The Supreme Court ordered that, “because we have vacated portions of the presiding officer's decision, we also vacate his award of attorney's fees and costs to allow the parties an opportunity to litigate the extent to which, if any, our decision has affected the amount of fees to which the Bureau is entitled.” *Appeal of Local Government Center, Inc. & a.*, slip op. at 21-22. Thus, the case was

remanded solely for the purpose of determining the amount of legal fees to be paid by Respondents to the BSR in light of the Supreme Court's decision. *Id.*; (Motion ¶3).

“[W]hen a case is remanded by [the Supreme 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, Inc.*, 120 N.H. 707, 709 (1980). The scope of the hearing following remand is limited to the specific purpose for which the case was remanded. *Id.*; *City of Rochester v. Smith*, 121 N.H. 184, 185 (1981). An agency is not permitted to expand the scope of the hearing. *Scarborough*, 120 N.H. at 709 (Human Rights Commission exceeded scope of remand to make specific findings of fact by holding hearing on amount of damages); *see also Smith*, 121 N.H. at 185 (superior court properly precluded party from presenting additional evidence when case remanded for determination of duration and extent of temporary disability).

Here, the Supreme Court remanded the case for a narrow, singular purpose: the determination of attorneys' fees to be paid by Respondents to the Bureau. Because any hearing on remand is limited to the single issue, the remand cannot provide a jurisdictional basis for the Presiding Officer to adjudicate alleged post-Final Order conduct or alleged violations of the Final Order. *See Scarborough*, 120 N.H. at 709; *Smith*, 121 N.H. at 185.

C. The BSR's Motion denies Respondents the procedural protection of review by the Secretary pursuant to RSA 5-B:4-a, I(a) and VI.

RSA 5-B:4-a, I(a) provides that the Secretary “shall have exclusive authority . . . [t]o bring administrative actions to enforce this chapter.” If the Secretary believes a person or entity has violated a Final Order, he “shall have the power to issue and cause to be served upon such person an order requiring the person to cease and desist from violations of this chapter.” RSA 5-

B:4-a, VI. The order issued by the Secretary shall provide the subject of the order with notice of his right to request a hearing, which shall be conducted pursuant to RSA 421-B:26-a.

The BSR “investigates complaints about licensees and may take administrative or legal action against persons who violate the New Hampshire securities law.” (Secretary of State’s website, BSR’s “About the Bureau” webpage). Although the BSR may be the enforcement arm of the Secretary of State’s Office, the legislature granted the Secretary exclusive jurisdiction to bring an action to enforce RSA ch. 5-B, including by issuing a cease and desist order. RSA 5-B:4-a, I(a) and VI. When the BSR filed the Motion requesting that the Presiding Officer order Respondents to cease and desist from violating the Final Order and RSA ch. 5-B, it deprived Respondents of the procedural protection of review by the Secretary.

The Motion should be dismissed for lack of jurisdiction because: (1) the BSR lacks the authority to seek a cease and desist order through the Presiding Officer; and (2) the Motion denies Respondents the due process protection of review by the Secretary found in RSA RSA 5-B:4-a, I(a) and VI.

CONCLUSION

For the foregoing reasons, the Presiding Officer should dismiss the Motion for Default Order for lack of jurisdiction because the allegations in the motion: (1) involve only conduct that occurred more than a year after the Final Order dated August 16, 2012; and therefore, (2) must be adjudicated through a new administrative proceeding because neither RSA 5-B:4-a nor RSA 421-B:26-a authorizes a presiding officer to exercise jurisdiction: (i) over post-administrative proceeding conduct; or (ii) for the purpose of enforcing a Final Order.

Respectfully submitted,

HEALTHTRUST, INC.

By Its Attorneys,

Dated: March 26, 2014

/s/ Michael D. Ramsdell
Michael D. Ramsdell (NH Bar #2096)
Ramsdell Law Firm, P.L.L.C.
46 South Main Street
Concord, NH 03301
(603) 856-7536
mramsdel@ramsdelllawfirm.com

/s/ David I. Frydman
David I. Frydman (NH Bar #9314)
General Counsel
HealthTrust, Inc.
25 Triangle Park Drive
P.O. Box 617
Concord, NH 03302-0617
603-230-3373
dfrydman@healthtrustnh.org

CERTIFICATE OF SERVICE

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

/s/ Michael D. Ramsdell
Michael D. Ramsdell