STATE OF NEW HAMPSHIRE

DEPARTMENT OF STATE

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

ORDER DENYING MOTIONS IN LIMINE PRECLUDING EXPERT TESTIMONY

On April 13, 2012 four motions were filed. The respondent Andrews filed two motions entitled "Respondent John Andrews' Motion to Preclude Expert Testimony From Michael A. Coutu Regarding the LGC Defined Benefit Pension Plan" and "Respondent John Andrews' Motion to Preclude Expert Testimony From Michael A. Coutu Regarding Real Estate Issues," seeking to limit testimony he anticipates may be offered at hearing by Michael A. Coutu, a witness for the Bureau of Securities Regulation ("BSR"). The respondent LGC filed a motion entitled "LGC's Motion in Limine to Exclude Testimony of Michael A. Coutu on Two Issues of New Hampshire Law," also seeking to limit testimony by Michael A. Coutu. The respondent Curro filed a motion entitled "Motion in Limine to Exclude the Testimony of Gregory S. Fryer, Esquire," seeking to limit testimony he anticipates may be offered at hearing by Gregory S. Fryer, another witness for

the BSR. On April 19, 2012 the BSR filed its "Bureau of Securities Regulation Objection to Respondents' Motions in Limine."

A motion in limine is a pretrial request that certain inadmissible evidence not be referred to or offered at trial. *Black's Law Dictionary* (9th ed. 2009); Typically, a party makes this motion when it believes that mere mention of the evidence during trial would be highly prejudicial and could not be remedied by an instruction to disregard. *Black's Law Dictionary* (9th ed. 2009); *see J & M Lumber and Const. Co., Inc. v. Smyjunas*, 161 N.H. 714, 722-23 (2011); *see also Milliken v. Dartmouth-Hitchcock Clinic*, 154 N.H. 662, 666-67 (2006). A motion in limine is most appropriately utilized in the context of a jury trial, where the disclosure of excluded evidence in the jury's presence could lead to a mistrial. *Black's Law Dictionary* (9th ed. 2009).

The applicable law in administrative proceedings generally and this administrative hearing specifically provides that the presiding officer shall not be bound by common law or statutory rules of evidence, nor by technical or formal rules of procedure. RSA 421-B:26-a, XX; *see In re Grimm*, 138 N.H. 42, 54 (1993). Moreover, all relevant, material, and reliable evidence shall be admissible, including testimony of witnesses. RSA 421-B:26-a, XX. Unlike a jury trial, the facts of this case shall be heard solely by the presiding officer, the same person to whom these motions have been directed and reviewed before this decision has issued. Unlike the effect a "mere mention" of evidence may have upon lay jury in a

judicial preceding, the risk of prejudice to a party, if any, due to the disclosure of the subject evidence to the fact finder two weeks before that same subject evidence may be submitted in this administrative preceding before the same fact finder to consider admissibility under recognized administrative standards is minimal. *See* RSA 421-B:26-a, XIV (e). The statute also provides that it is within the presiding officer's discretion to make determinations as to the admissibility of testimony at the hearing, thereby, allowing his exclusion of any irrelevant, immaterial, unreliable, or duly cumulative or repetitious evidence proffered by a party at the time it is offered at hearing. RSA 421-B:26-a, XX. Likewise, it is within the presiding officer's discretion to determine credibility or weight of evidence of any testimony provided for during a hearing. *In re Gilpatric*, 138 N.H. 360, 364 (1994); *see* RSA 421-B:26-a, XIV (n). Therefore, the presiding officer, "as trier of fact, has discretion to credit or discredit the testimony of expert witnesses," during an administrative hearing. *In re Blake*, 137 N.H. 43, 49 (1993).

The New Hampshire standard for expert testimony, although not binding on the presiding officer, is instructive upon determining whether a witness is qualified to hold the role of expert witness and therefore, offer testimony in the form of an opinion. Accordingly, this standard provides that "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill,

experience, training, or education, may testify thereto in the form of an opinion or otherwise." N.H. R. Evid. 702.

In respondent Andrews' two motions, testimony is sought to be precluded on the basis that BSR's witness, Michael A. Coutu, is both unqualified and unreliable to testify to matters concerning the LGC defined benefit pension plan and LGC real estate issues. Specifically, Andrews contends that Coutu is unqualified to testify concerning defined benefit pension plans because he lacks any expertise in the creation, implementation, or administering of said plans. Next, Andrews claims Coutu is unqualified to testify on whether the LGC real estate arrangement violates or violated RSA 5-B. Lastly, Andrews argues that Coutu is an unreliable witness because he lacks knowledge regarding critical facts underlying his opinions on LGC real estate issues and he has not reviewed the appropriate pension plan document, while he also doubts its accuracy.

Similarly, LGC seeks to preclude testimony on the basis that Michael A. Coutu is unqualified and unreliable to offer testimony concerning the meaning of RSA 5-B provisions, and New Hampshire law on fiduciary duties and breach of duty. LGC contends that Coutu lacks the training or expertise to offer legal opinions on RSA 5-B provisions, and further, Coutu's personal opinion is not relevant, material, or reliable. Moreover, LGC claims that Coutu's testimony is unreliable because his knowledge on the above subjects was gained only though reading the statute and consulting with other attorneys.

In respondent Curro's motion, testimony is sought to be precluded on the basis that the opinion of BSR's witness, Gregory S. Fryer, is irrelevant and does not assist the trier of fact. Curro contends that Fryer's opinion is not relevant because it does not make a fact, concerning whether or not agreements are securities, more or less probable than without his testimony. Likewise, Curro claims that Fryer will not assist the hearing officer with his testimony because he has no opinion whether or not the agreements are securities.

As this presiding officer has stated previously in his "Order Denying Motion to Preclude Testimony," dated January 25, 2012, "such determinations [regarding the admissibility of expert testimony] are best made when actual expert testimony is to be offered into evidence at the hearing and not prior to determining the qualifications of the expert and considering the accuracy of testimony." Additionally, in the "Order Denying Motion to Preclude Testimony," this presiding officer held that the admissibility of expert witness testimony "shall be made at the evidentiary hearing and its credibility and the weight to be assigned to it shall be considered in making the final decision in this matter." Thus, the evidentiary rulings that the respondents Andrews, LGC, and Curro have moved for in each instance are best determined in the context of the full administrative hearing, following revelation of witness expertise through inquiry of both parties in the context of the hearing and at the time inquiry is to be made of the subject witness.

Further, the respondents have not sufficiently stated a prejudice that would be suffered as a result of the denial of each party's motion at the time this decision is issued. Therefore, each of the party's motion *in limine* is denied, without prejudice to each party to raise an objection to any witness's testimony at hearing.

So ordered, this 24th day of April, 2012

/s/ Donald E. Mitchell
Donald E. Mitchell, Esq.
Presiding Officer

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