STATE OF NEW HAMPSHIRE

DEPARTMENT OF STATE

BUREAU OF SECURITIES REGULATION

IN THE MATTER OF:	
Local Government Center, Inc.; Government Center Real Estate, Inc.; Local Government Center Health Trust, LLC; Local Government Center Property-Liability Trust, LLC; Health Trust, Inc.; New Hampshire Municipal Association Property-Liability Trust, Inc.: LGC – HT, LLC Local Government Center Workers' Compensation Trust, LLC; And the following individuals: Maura Carroll; Keith R. Burke; Stephen A. Moltenbrey; Paul G. Beecher; Robert A. Berry; Roderick MacDonald; Peter J. Curro; April D. Whittaker;Timothy J. Ruehr; Julia A. Griffin; and John Andrews	Case No.: C-2011000036
RESPONDENTS	

ORDER ON MOTIONS TO INTERVENE BY PROFESSIONAL FIREFIGHTERS OF NEW HAMPSHIRE AND NEW ENGLAND POLICE BENEVOLENT ASSOCIATION AND ON MOTION TO AMEND MOTION TO INTERVENE TO EXPAND REPRESENTATION

BACKGROUND

On October 18, 2011 in Concord, New Hampshire a hearing was conducted on the issue of whether or not certain would-be intervenors can be granted intervenor status in this case and, if so, participate fully or within limitations in future administrative proceedings in the underlying matter. The underlying matter arises from a staff petition submitted by the Bureau of Securities Regulation ("BSR") alleging that the named respondents, as appear in the caption above,

undertook a series of acts resulting in violation of RSA 5-B, "Pooled Risk Management Programs" and RSA 421-B, "Securities". Pursuant to RSA 421-B:26-a,V a "Notice of Order" issued on September 2, 2011 by the secretary of state granting the BSR petition. The actions alleged in the BSR petition generally relate to the formation, organization and conduct of several related entities, referenced for convenience as the Local Government Center ("LGC") and its affiliates, and of two individuals who have held the position of executive director of the LGC, namely respondents Carroll and Andrews, and several of its board members in connection with the creation and operation of pooled risk management programs and other LCG affiliates. The actions alleged in the BSR petition also relate to the legality of certain expenditures by and among the LGC and its affiliates, particularly funds contributed by municipalities and employees of municipalities to acquire health services and products. Among these health services and products were medical insurance coverage plans provided through agreements between the LGC and its affiliates and public employers referred to as "political subdivisions" in RSA 5-B:2,III.

On September 6, 2011 the Professional Firefighters of New Hampshire ("PFFNH") filed a "Motion to Intervene" in these proceedings. On September 19, 2011 the New England Police Benevolent Association, Inc. ("NEPBA") filed a "Motion to Intervene" and, the PFFNH filed a "Motion to Amend", its earlier request to intervene, to expand its representation to include several other employee organizations and labor unions[1] that also represent individuals who contribute or have contributed into health service related pooled risk management programs created pursuant to RSA 5-B. Subsequently objections or requests to join in objections to these motions were filed in a timely manner by respondents' counsel. The petitioner, BSR, took no position on the motions.

At the hearing before the undersigned presiding officer, parties were represented by counsel who made offers of proof and oral argument in support of their respective filings on all motions, and objections and had the opportunity to challenge opposing offers of proof and to provide rebuttal in oral argument. The record was held open until October 21, 2011 to allow all parties to submit supplemental memoranda of law. Following his review of all relevant filings and the oral arguments made, the presiding officer determines as follows:

FINDINGS OF FACTS

1. On September 2, 2011 the Secretary of State granted a staff petition submitted by the Bureau of Securities Regulation ("BSR") and issued a "Notice of Order", pursuant to RSA 421-B:26-a,V to the above captioned entities and individuals as well as two other individuals whose names have previously been withdrawn on request of the BSR without objection and are no longer parties in this matter.

[1] These organizations are: State Employees' Association of New Hampshire, SEIU Local 1984; National Education Association – New Hampshire; American Federation of State County and Municipal Employees, Council 93; and, American Federation of Teachers – New Hampshire

2. All named entities and individuals in the above caption responded to the Secretary's notice by having legal counsel file appearances in a timely manner.

3. Each of those named entities and individuals appearing in the above caption are respondents, with the exception of the BSR which is the petitioner, and are parties to these proceedings.

4. On September 6, 2011 a "Motion to Intervene" was filed by the Professional Firefighters of New Hampshire ("PFFNH"), a voluntary association, on behalf of "the original complainant," (See LGC Exhibit #1, undated letter, signed by "James Squires, President, Professional Firefighters of Hampton, IAFF Local 2664" addressed to "Fred Welch, Town Manager, Town of Hampton") a class of [its] retiree members and the association itself.

5. Retirees of the PFFNH pay 100% of their present premiums directly to the LGC which acts as a billing or collection manager for the political subdivisions who have entered into agreements with the Health Trusts. (See Respondent LGC Appendix A Bate-Stamped LGC-AH00062-67 and LGC- AH00063-64).

6. James Squires did not write the undated letter addressed to Fred Welch in an individual capacity, but did so in his representative capacity as president of the professional firefighters of [the Town of] Hampton. It is that entity and not the individual who may be considered as the "original complainant" referred to by the PFFNH.

7. On September 19, 2011 a "Motion to Intervene" was filed by the New England Police Benevolent Association ("NEPBA") that is a corporation and New Hampshire employee organization generally representing present and retired law enforcement personnel.

8. On September 21, 2011 counsel for the PFFNH filed a motion to amend the September 6, 2011 request to intervene in these proceedings by expanding its representation to include other employee unions (see footnote #1)

9. All of the employee organizations and unions named represent individuals employed, or formerly employed by public entities, *e.g.* municipal, county and state employees and school districts, and who participate or participated in health related services and products provided by the Local Government Health Trust, LLC or Health Trust, Inc. or both. (collectively referred to, for purposes of this decision, as "Health Trusts.")

10. The participation of these employees and former employees, among other things, includes the payment of varying percentages of medical insurance premiums or other contributions to the LGC or the Health Trusts, either directly or indirectly through their respective public employers and in return for which medical benefits were provided.

11. The benefits to be provided to employees represented by these employee organizations were obtained through a collective bargaining process between the public employer and the union or organization representing its employees.

12. In the event that partial intervenor status is granted, the would-be intervenors agree to be subject to any reasonable limitations deemed necessary by the presiding officer to protect the due process rights of the Respondents.

13. The would-be intervenors hold the belief and are of the opinion that the BSR can competently perform the representation necessary to support the allegations contained within the petition.

14. All of the motions were objected to in a timely manner by one or more of the respondents.

15. The Local Government Center, Inc. is comprised of members who are public employers, many of which, through negotiation with the would-be intervenors or otherwise, make health services and products of the Health Trusts available to their employees respective public employees.

16. The other named entities appearing in the caption are respondents and are or were affiliated with the LGC.

17. The named individual Carroll is the Executive Director of the LGC and is a respondent in these proceedings.

18. The named individual Andrews was previously the Executive Director of the LGC and is a respondent in these proceedings.

19. The remaining named individuals each appear to be or have been related to the operation of the LGC or its affiliates and are respondents in these proceedings.

20. The LGC represents that in the event these proceedings result in a decision requiring it to be subject of rescission, make restitution or disgorge itself of any funds, the LGC's or its affiliates' obligation to do so would be to the political subdivisions.

21. The underlying petition alleges that the respondents, or some of them, violated provisions of either RSA 5-B or RSA 421-B, or violated provisions of both.

22. Neither RSA 5-B nor RSA 421-B contain a provision that expressly defines, describes or expressly provides a specific procedure by which the status of intervenor may be obtained in proceedings contemplated by RSA 421-B:26-a.

23. RSA 5-B:4-a, VI provides, "All hearings shall be conducted in accordance with RSA-B:26-a."

24. RSA 421-B:26-a,I provides, "All hearings conducted pursuant to this chapter shall be governed by the provisions of this section and the provisions of RSA 541-A shall not apply to this chapter."

25. Both RSA 5-B and RSA 421-B allow for judicial review of orders issued by the presiding officer as designee of the secretary of state as may be allowed under the provisions of RSA 541.

26. RSA 421-B:27 expressly provides, " Requests for rehearings and appeals from orders of the secretary of state shall be governed by RSA 541 and by the rules adopted by the secretary of state pursuant to title XXXVIII and RSA 541-A."

27. The statute addressing hearing procedures, RSA 421-B:26-a, at various places uses the terms, "respondent", "interested persons", "interested parties", and "parties" without providing a definition of any of those terms.

JURISDICTION

The secretary of state is responsible for and is granted the authority to conduct adjudicatory proceedings and hearings related to violations of RSA 5-B (the "Pooled Risk Management Programs" law and RSA 421-B (the "Securities" law). The secretary of state may delegate this responsibility to a presiding officer, and the authority and jurisdiction to conduct such proceedings is exclusive. (See RSA 5-B:4-a,I and RSA 421-B:26-a,I).

DISCUSSION

This case involves an administrative action initiated by the staff of the BSR using the vehicle of a petition that was submitted to the secretary of state who in turn issued an order granting the petition. The petition was then forwarded with a notice of order to the entities and individuals named in the above caption. As the petitioner, the BSR is a party in the administrative proceedings that follow.

On the other side are those who have been named because the petitioner, BSR, alleges that actions they have undertaken violate the laws of New Hampshire, namely RSA 5-B and RSA 421-B. Having a petition such as this brought against them, they are referred to as respondents and have the right to a hearing to contest the allegations and RSA 421-B:26-a,V(a) assigns that term to them and acknowledges their right to be heard. As respondents, each is a party in the administrative proceedings that follow.

The specific request before the presiding officer at this time is raised by several other entities that have filed motions to intervene in the proceedings and, if granted intervenor status, may acquire the full equivalency of rights afforded the parties in this administrative action or at a level of participation reasonably limited by conditions set by the presiding officer.

One of these would-be intervenors, the PFFNH, asserts that its original motion to intervene seeks representation for three distinct would-be intervenors: an individual described as "the original complainant", the employees represented by a voluntary association named the Professional Firefighters of New Hampshire, and a group of retired individuals who are or had been members of the PFFNH. The intervention request is essentially based upon the participation of each in the health services and product programs provided by the LGC or its Health Trusts, or both. Another of the would-be intervenors, the NEPBA, seeks participation on its own behalf and

on behalf of its active and retired members who have contributed funds to the LGC or its Health Trusts, or both. The additional employee organizations: State Employees' Association of New Hampshire, SEIU Local 1984; National Education Association – New Hampshire; American Federation of State County and Municipal Employees, Council 93; and, American Federation of Teachers – New Hampshire seek to intervene using the same counsel as has appeared for the PFFNH. They, too seek to participate on behalf of the present employees and retirees that each represents.

At the hearing each of the would-be intervenors joined in the others' arguments and collectively assert that as employee organizations that have bargained collectively for health and other benefits for their association, itself, and on behalf of the employees and retirees they represent. They also assert that they possess direct pecuniary interests in the outcome of this case, if not a property right in the outcome of this case, and are therefore "interested parties" as that term is used in RSA 421-B:26-a. It is less clear whether the claim of a "property right" specifically contained within the NEPBA written motion is based upon the statute or was intended to introduce some constitutional basis for intervention. As that latter basis was not further developed in the motion, in the oral argument, or added in supplemental memoranda of law I do not consider it to have been sufficiently raised by the would-be intervenors.

Whether violations are alleged to have been committed in this case under the provisions of either statute, RSA 5-B or RSA 421-B, the governing procedures for any related administrative hearings appear in the same statutory provision, namely RSA 421-B:26-a. This statutory treatment by the legislature is exceptional as most state agencies promulgate their respective rules for administration of hearings and other agency proceedings under the provisions of the state's Administrative Procedures Act, RSA 541-A. Indeed, the adoption of the Administrative Procedures Act brought structure and improved due process to the diverse agencies within the state that conduct administrative hearings as part of their enforcement responsibilities. If RSA 541-A applied to either of the statutes involved in this case, then it would be reasonable to presume that a specific provision addressing the method of qualification and participation of intervenors could be relied upon directly, *e.g.* RSA 541-A:32. However, in this matter the statute specifically provides that, "the provisions of RSA 541-A shall not apply". (See RSA 421-B:26-a,I). Therefore, the would-be intervenors have no specific, express regulatory provision by which to attempt to qualify and directly protect their alleged interests as may be available in other administrative hearings.

A question remains as to whether the statute is clear and unambiguous as to whether or not any party, beyond the petitioner and the respondents, can participate in administrative hearings conducted to enforce RSA 5-B or RSA 421-B. Had the legislature been more consistent in its use of language, there may have been much less for the respondents and the would-be intervenors to contest. However both groups acknowledge, as they must, the use of the terms "respondent" (RSA 421-B:26-a,V(a), "interested persons" (RSA 421-B:26-a,VI(a), and "interested parties" (RSA 421-B:26-a,X(b) as they appear within the statute. None of these terms are defined in RSA 5-B or in RSA 421-B. The use of these several terms, and particularly the terms "respondent" and "interested persons" creates an ambiguity because two or more reasonable interpretations can be assigned to the meaning of "interested persons" as have been advanced by the respondents and the would-be intervenors on this occasion.

The statute instructs the secretary of state if he or she grants any part of the petition (which he did in this matter) that, "the *respondent* shall be informed, as part of the hearing notice, of the *respondent's* right to a hearing." (RSA 421-B:26-a,V(a). The statute then mandates that the notices of hearing shall be "prepared and forwarded in a manner which affords *interested persons* sufficient opportunity to prepare for and deal with the issues to be considered and decided upon at the hearing." (RSA 421-B:26-a,VI(a). Further into the statute after a hearing has been scheduled specifically under circumstances involving a request for a continuance the statute mandates that any request for a continuance shall contain "dates and times when all *interested parties* shall be available." (RSA 421-B:26-a,X(b).

If I assign the plain and ordinary meaning to the word "respondent" there is no ambiguity as to what it refers within the context of the overall statutory scheme. The governing statute is one that contemplates a complaint of violating statutory provisions being incorporated into a petition filed by the BSR against a party or parties who become named respondents if the petition or any part of it is granted by the secretary of state as provided for in RSA 421-B:26-a,V(a). The named violators are to be informed of their right to a hearing to contest the allegations filed against them and subject to the notice of order issued by the secretary of state. A respondent is a party who responds to a petition. *Webster's New World Law Dictionary*, 2010, Wiley Publishing, Inc. In New Hampshire the term "respondent" is a common label ascribed to the party who responds to a petition or against whom allegations may be made in a civil matter in equity.

However, the use of the term "interested persons" in the very next subsection of the statute appearing just three sentences later does create an ambiguity. The ambiguity is caused by the failure of the legislature to use the identical term "respondent" when mandating that notices of hearing, including the important notice scheduling the first hearing shall be done in a manner which "affords interested persons to prepare and deal with the issues to be considered and decided upon at the hearing." Why did the legislature not merely repeat the use of the word "*respondent*" that it used three lines earlier if that is who was to be given an opportunity to prepare for and deal with issues arising from the allegations in the petition? The ambiguity results because an "interested party" takes on legal significance in a judicial or administrative proceeding and can result in the granting intervenor status.

All words in a statute must be given some meaning. Counsel for the NEPBA is correct when he insists that these words, "*interested persons*" are not "ghost words" within the statute. Further, these words cannot be considered in isolation, but must be considered within the context of not only RSA 421-B but RSA 5-B as well because RSA 421-B:26 is integral to the enforcement of each statute.

If the legislature intended that interests other than the interests represented by the petitioning BSR and the respondents be allowed to participate in the hearing, did it intend that the would-be intervenors are such interested persons? While the courts have "rather freely allowed [intervenors] as a matter of practice. *Brzica v. Trustees of Dartmouth College,* 147 N.H. 443 (2002), the courts hold that intervention motions should be granted if the party seeking to intervene has a right involved in the trial and a direct and apparent interest in the matter. *Snyder v. N.H. Savings Bank,* 123 N.H. 137 (1991). Often the New Hampshire courts are exercising

their "powers in equity" in granting intervenor status. No such equity powers are within the jurisdiction and authority provided by RSA 421-B:26-a. The restrictive nature of this statute, evidenced by the express exclusion of the application of the Administrative Procedures Act ,RSA 541-A, and the approximately fifteen years during which the legislature has allowed the exclusion to continue is evidence that it was intentional to have these administrative proceedings conducted in a manner not commonly utilized in other agencies' hearings.

To gain intervenor status the would-be intervenors must sufficiently establish that they have an interest that arises under RSA 5-B and is direct and apparent. A review of RSA 5-B applied to the present matter clearly reveals it to be a statute that allows political subdivisions to maintain an association to develop and administer a pooled risk management program that would be operated for the benefit of those political subdivisions. This statute also provides exclusive authority and jurisdiction to bring administrative actions to enforce the statute's provisions. One of those provisions mandates that the pooled risk management program shall return all earnings and surplus in excess of any amounts required for administration, claims, reserves and purchase of excess insurance to the participating political subdivisions. (RSA 5-B:5(c). The term "political subdivision" is defined as any city, town, county, school district, chartered public school, village district, school administrative unit, or any district or entity created for a special purpose administered of funded by any of these entities. RSA 5-B:2, III. Also, within the purposes of RSA 5-B the legislature found and determined "that pooled risk management is an essential governmental function by providing focused public sector loss prevention programs, accrual of interest and dividend earnings which may be returned to the public benefit..." RSA 5-B:1. The would-be intervenors do not assert that they represent an interest of public benefit.

The interests advanced by the would-be intervenors spring from contributions and participation in a pooled risk management program negotiated through collective bargaining with public entities who had entered into agreements with the LGC or with the Health Trusts, or with both whose actions are subject to the provisions of RSA 5-B and RSA 421-B and to be enforced by the secretary of state. The would-be intervenors believe, as the BSR alleges in its petition, that the respondents violated these statutes and that if proven, the respondents could be ordered to make restitution in the form of funds, or to disgorge themselves of funds. Yet there is no interest in such funds created within the statute for any others beyond the political subdivisions and no other legal basis to share in the only relief allowed under this statute has been advanced.

DECISION AND ORDER

After due consideration of the written filings submitted by the parties, offers of proof presented at the hearing, and review of the applicable statutes and case law I do not find that the interests asserted are direct and apparent for the following reasons: (1) the BSR is the state agency exclusively charged with enforcing the both statutes; (2) the violations of the respondents alleged by most if not all of the would-be interveners "mirror" those contained in the BSR

petition; (3) the would-be intervenors admit that the petitioner, BSR, can perform its enforcement obligation in these proceedings competently, thereby assuring that violations by the respondents that may lead to any funds being forfeited by the respondents will be appropriately pursued; (4) that even if the respondents are found to have violated the statute and the appropriate remedy requires a return of funds by some manner, those funds are mandated by RSA5-B to be returned to the political subdivisions; and (5) that issues raised by would-be intervenors to establish the exact pecuniary interest claimed by each of them would introduce factual issues related to collective bargaining agreements and attendant negotiations and facts related to proportional contributions that are not necessary to the determination of what relief, if any, by way of rescission, restitution or disgorgement is owed to the political subdivisions as the only eligible recipients designated by statute.

Ruling in such a manner is not done without concern by the presiding officer over the ambiguity created by the language as presently exists in the statute, but that is for the legislature to address. Nor is it done without genuine concern as to what relief may remain available to the would-be intervenors in pursuit of their claimed pecuniary interest at some later date in some other forum in the event the petitioner and respondents resolve this matter with an agreement leading to the submission of consent decree.

Notwithstanding those observations, the motions to intervene are denied and the motion to amend to add additional would-be intervenors is denied. Such previous permission granted to the would-be intervenors to attend and participate in a limited fashion in the proceedings to date is revoked as of the date of this decision appearing below. No fees or costs are assigned to any party other than the accumulation of those contemplated by application of RSA 5-B or RSA 421-B.

So Ordered, this 3rd day of November, 2011

Donald E. Mitchell

Donald E. Mitchell, Esq. Bar #1773
Presiding Officer

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