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 TO DISMISS FOR LACK OF JURISDICTION

BACKGROUND

On September 2, 2011 the Bureau of Securities Regulation ("BSR") initiated a Petition against multiple respondents as part of its regulatory authority, referred to in previous filings as the "LGC entities" and to which the present day respondents Health Trust, Inc. ("HT") and Property Liability Trust, Inc. ("PLT") are represented to be successors in interest. In brief, that Petition caused administrative proceedings to ensue in accordance with the procedural steps provided by the relevant statutes, N.H. RSA §5-B (Pooled Risk Management Programs) and RSA §421-B (Securities).[1] A ten-day administrative hearing was conducted by the undersigned presiding officer that resulted in a final order, dated August 6, 2012 finding the institutional respondents in violation of certain provisions of RSA §5-B. The respondents' subsequent motion for reconsideration was also denied and respondents filed an appeal with the Supreme Court pursuant to RSA §5-B:4-a. The respondents also filed a "Motion to Stay" the implementation of the final administrative order pending appeal that was denied by the Supreme Court except for the provision regarding the $17.1 million transfer of funds from PLT to HT. On January 10, 2014, the Supreme Court issued its decision affirming the provisions of the final administrative order except for provisions regarding the setting of prospective reserve levels and prospective purchase of reinsurance. The Court remanded the issue of determining the payment of legal fees and costs by the respondents to the BSR. [2]

PROCEDURAL BACKGROUND

Under these affirmed provisions of the final administrative order the respondents were directed to undertake reorganization actions that would result in their proper governance as addressed in the final administrative order and Supreme Court decision and to conform to the statutory requirements of RSA

[1] A more detailed description of prior proceedings may be found in the Final Order dated August 16, 2011 and the Supreme Court Decision No. 2012-0729, Decided January 10, 2014. Both of documents can be viewed at **www.sos/ng.gov** in addition to all previous filings in this administrative proceeding.

[2] See *Appeal of the Local Government Center*, Docket No. 2012-0729 (decided January 10, 2014)

§5-B in order to maintain the benefits provided to qualified "pooled risk management programs" under that statute. The final order also determined that PLT was to repay the amount of $17.1 million to HT. Under the terms of the administrative order PLT had been allowed approximately sixteen months to satisfy that provision of the order by December 31, 2013

Following the Supreme Court's January 10, 2014 affirmance, the BSR filed a request on February 7, 2014 entitled, "Motion For Entry of Default Order." The BSR filing alleges that the respondent Local Government Center entities have not complied with certain terms of the final administrative order, as affirmed by the Supreme Court. The BSR claims that the respondents have not reorganized as directed by the order and in a manner that meets the standards found in RSA §5-B. Also, the BSR alleges that a confidential agreement entered into between HT and PLT, which would spring into effect if the Supreme Court affirmed the relevant terms of the administrative hearing officer's decision, does not bring PLT into compliance with the administrative order to repay $17.1 million to HT. BSR alleges that the failure of the respondents, HT and PLT, to comply with the terms of the final administrative order should result in a forfeiture of the benefits afforded "pooled risk management programs" through exemption from state insurance laws and state taxation provided by RSA §5-B.

On February 18, 2014, HT and the PLT each filed an "Objection to BSR's Motion for Entry of Default Order." These filings are similar in substance and deny the BSR's allegations regarding non-compliance. Each respondent asserts a threshold objection that this administrative tribunal lacks jurisdiction to determine the issues raised by the BSR in its February 7, 2014 motion.

On March 10, 2014, the administrative hearing officer convened an informal conference of counsel was convened by the administrative hearing office to discuss procedural aspects of this matter and to streamline the conduct of any further proceedings. After discussing the parties' respective positions, the hearing officer agreed with the respondents' counsel over the objection of the BSR that the issue of jurisdiction should be determined prior to and not contemporaneous with a hearing on the merits of the issues raised by the BSR filing. A recess was declared to allow counsel the opportunity to discuss the terms of a scheduling order. Following completion of that conference, the hearing officer issued an order on March 13, 2014 that incorporated the joint scheduling request of the parties. Also as a result of that conference and the resulting schedule, on March 26, 2014 the respondents each filed a separate Motion to Dismiss the BSR allegations on the basis that the administrative hearing officer did not have jurisdiction to proceed. On April 4, 2014 the BSR filed its objection to the respondents' specific requests that further proceedings in this matter be dismissed for lack of jurisdiction.

In the later afternoon of Thursday, April 11, 2014, preceding the Monday April 14, 2014 scheduled hearing, respondents' counsel submitted a written motion requesting the hearing officer to disqualify himself from conducting the hearing. At the outset of the hearing, the hearing officer denied the respondents' motion calling for his disqualification. The scheduled hearing on the jurisdictional matter then commenced in Concord before the undersigned hearing officer with all parties represented by counsel. Counsel, having previously submitted exhibits and memoranda of law in support of their respective positions regarding the scheduled issue of jurisdiction, were provided the opportunity to present oral argument and rebuttal. After considering the parties written submissions and each oral argument, the hearing officer declared a recess to consider the issue of jurisdiction. The hearing officer reached his decision, reconvened the hearing and informed the parties that the respondents' motions to dismiss for lack of jurisdiction were denied, indicating that a written decision would follow. The reasoning for the denial of jurisdiction decision follows.

DECISION

These parties are subject to adjudicatory proceedings conducted by the undersigned presiding officer pursuant to RSA §421-B:26-a, I, which states, "all adjudicatory proceedings pursuant to this chapter shall be conducted by the secretary of state or by a presiding officer appointed by the secretary of state." The underlying matter involves a regulatory proceeding involving certain actions undertaken by the respondents alleged by the BSR to violate or to avoid the effect of the provisions of the final administrative order issued by the undersigned official on August 16, 2012 and affirmed by the New Hampshire Supreme Court on January 10, 2014.[3]

The BSR requests that the respondents be found in default of the order and, if found not in compliance with that order, that each respondent forfeit the status of a "pooled risk management program" as defined in RSA§5-B and as provided for in the final administrative order. The respondents filed their objections to the BSR allegations and filed separate motions to dismiss these proceedings asserting a lack of jurisdiction for the presiding officer to proceed. Therefore, the issue addressed in the instant hearing is whether the administrative hearings officer has jurisdiction to reach the merits of the BSR motion.

Jurisdiction is generally conferred upon an administrative hearing process by statute and New Hampshire is no exception. The legislature has assigned broad authority to the department of state to oversee and enforce the implementation of RSA §5-B. The extent of that authority is described such that "[t]he secretary of state shall have all powers specifically granted or reasonably implied in order to perform the substantive responsibilities imposed by this chapter." RSA §5-B:4-a, II. The pooled risk management program statute incorporates the specific administrative hearing process provided in RSA §421-B:26-a and exempts these actions from the application of the more general procedures of RSA §541-A.

The respondents' positions can fairly be characterized as asserting that: (1) there is no express statutory grant of jurisdiction to the administrative hearings officer to review a party's conduct to determine whether the administrative order has been complied with; (2) a long time has passed since the issuance of the final administrative order, dated August 16, 2012, and the BSR motion, dated February 4, 2014, and that events have occurred that were not subject of the administrative hearings process to date; (3) that jurisdiction to determine compliance with the order is prohibited by the appellate action of the New Hampshire Supreme Court, including an assertion of *res judicata*, that is, the administrative tribunal is prevented from considering the issue because of the decision of the Supreme Court; and, (4) that the respondents' due process rights are denied without the allegations contained within the BSR being restated in a new and separately filed BSR petition with the secretary of state.

First, to adopt the respondents' interpretation of the relevant statutes, RSA §5-B and RSA §421-B:26-a, would nullify the valuable function administrative hearings perform in our system of jurisprudence. Administrative hearing processes are generally established by the legislature, in part, in recognition that such processes can address specialized matters more efficiently and effectively than courts of general jurisdiction. Legislation simply cannot address every contingency that can arise from the conduct of administrative proceedings, and the administrative tribunal is allowed an appropriate degree of discretion in the adjudicatory phase to enforce the statutory purpose. RSA §5-B and RSA §421-B:26-a must be considered in their full context, as they should, under the principles of statutory

[3] In addition to the many provisions affirmed by the Supreme Court, it also vacated two provisions related to the prospective treatment of two issues and remanded the issue of the repayment of legal fees. None of these three issues is germane to this instant matter.

construction. Taken together they cannot be interpreted to mean that the legislature would intend the determination of facts as to whether a party is complying with the provisions of the administrative order be transferred to the superior court without express language assigning that responsibility to the superior court. No such express language transferring the fact finding obligation of the administrative tribunal appears in either statute. Indeed, the exhaustion of administrative remedies prior to resorting to courts of general jurisdiction is a legal precept that recognizes the specialized function of administrative adjudicatory proceedings interacting with courts of general jurisdiction.

The respondents' reliance on a partial statement within RSA §5-B:4-a, IV would burden the superior court with the task of monitoring and fact-finding innumerable specialized orders of administrative agencies. The very purpose of the creation of administrative tribunals is to allow specialized statutory matters to be addressed without burdening the courts of general jurisdiction. To conclude that the issuing tribunal possesses the authority to determine if the parties are in compliance with its order is not only a reasonable and logical application of law, it is a necessary one. There has yet be a factual finding of whether the respondents' have or have not complied with the affirmed provisions of the final administrative order. To adopt the respondents' interpretation of the statutes would put the proverbial "cart before the horse."

The legislature has not expressly granted the injunctive or contempt authority possessed by the superior court to this administrative tribunal under RSA §5-B or RSA §421-B:26-a. Any involvement of the superior court is intended by the statute to be that of using its injunctive or contempt authority to enforce the administrative order. It is only in that rare instance of refusal to comply by a party, after an authorized administrative adjudication of the compliance issue has factually been determined that reliance upon the enforcement power of the superior court may have to be sought as intended by RSA §421-B:26-a, IV.

The second basis for dismissal relied upon by the respondents alleges that the administrative tribunal lacks jurisdiction due to certain temporal considerations. These include the passage of time since the final administrative decision, the occurrence of events during the time that has passed and the assertion that substantive matter at issue has already been "completed." As stated earlier in this decision, the final administrative order of August 16, 2012 was followed by a period of time dictated by the appellate process that resulted in a Supreme Court decision issued January 10, 2014. The respondents sought and were granted by the Supreme Court a partial stay of a provision of the administrative order regarding the repayment of the $17.1 million by PLT to HT that was to have occurred by December 31, 2013. The BSR alleges that a confidential agreement entered into between the respondents in or about October 2013 while the respondents appeal was pending and was designed to spring into effect in the event the Supreme Court upheld the $17.1 million repayment, thus avoiding compliance. As to the structural reorganization matter, the respondents assert that a structural reorganization was undertaken as directed in the final administrative order in or about November 2012, notwithstanding its appeal.

There is no express expiration of jurisdiction of this administrative tribunal to determine whether or not its order has been complied with appearing in either RSA §5-B or RSA §421-B:26-a due to the passage of time or the nature of the events asserted by the respondents to have "evolved" since the administrative decision. That the respondents undertook actions or "steps" following the administrative order was exactly what was contemplated as the order mandated certain corrective actions in order for them to maintain their status as pooled risk management programs under RSA §5-B. It is the factual determination whether those actions complied with the order that forms the basis of the underlying BSR motion and its objection to the respondents' motion to dismiss these proceedings at this time. The record of proceedings in this matter and the representations of the parties of intermittent periodic discussions between the respondents and the BSR and the timely action of the Supreme Court reveal little impact

that staleness might, under other circumstances, bring to bear. Indeed the continuum of these proceedings includes the inclusion of the BSR filing of February 7, 2014 within the period of reconsideration of the Supreme Court decision. Neither the passage of time nor the nature of the events or occurrences asserted by the respondents can reasonably foreclose jurisdiction of this administrative tribunal to fulfill the obligations assigned to it.

The respondents also interpret RSA §421-B:26-a, XIV(p) in a manner that would appear to beg the question. That provision of the statute provides that the presiding officer can, "[t]ake any action in a proceeding necessary to conduct and complete the case, consistent with applicable statutes, rules, and precedents." The respondents declare that the underlying matter is "completed" as a final administrative order has issued and the Supreme Court granted an appeal. However, the statute does not provide and no controlling case law can be found to support the declaration that the law gives authority to a party to a regulatory action to determine when such action is complete or that it is complete with the issuance of a final administrative decision and Supreme Court affirmance. More often than not it is the conduct of the parties themselves that determine whether a matter is complete. There are several post decision actions that come to mind. The respondents filed their required motions for reconsideration after the issuance of the final order. Had the respondents required clarification after the issuance of the order, it would be reasonably expected by the respondents that the issuing hearing officer would have issued some post decision order. Indeed, had the respondents sought to file a request with the tribunal for a modification of a specific provision of the final order, there is no provision in the law that would have prevented its consideration by the administrative tribunal. Without ruling, it is conceivable that the post decision submission of a joint settlement agreement among the parties in lieu of compliance with a specific provision of the final order may be accepted within the jurisdiction of the issuing administrative authority.

Next, the respondents argue that the jurisdiction of this administrative tribunal was terminated when the Supreme Court accepted the appeal of the administrative order. There may be some circumstances where the Supreme Court may foreclose any further proceedings in an administrative, civil or criminal matter or prohibit any further action on an issue other than one specifically remanded. However, the present circumstances do not lead to such a result. Rather, the law provides that the appeal process acts to suspend, not terminate, jurisdiction of the lower tribunal. Following an appeal decision, jurisdiction returns to the tribunal having issued the decision.

The alleged non-compliance issues raised by the underlying BSR motion were not known to the Supreme Court and, it would appear from the pleadings and argument of both parties and by direct inquiry of the undersigned presiding officer, were not brought to the attention of the supreme court during the pendency of the appeal, *a fortiori* when the respondents participated in oral argument before it.[4] Therefore, the Supreme Court cannot be said to have had the benefit of facts alleged in the underlying motion involving compliance. The belief that the Supreme Court decision does not prohibit this tribunal from exercising jurisdiction to determine whether its order has been complied with is likewise not changed by the existence a single separate issue being remanded by the court for further proceedings. This is the repayment of legal fees and costs issue that was originally reserved by the hearing officer and lightly remarked upon and remanded by the Supreme Court in its decision. A single issue remanded by the Supreme Court does not extinguish jurisdiction of a lower tribunal to address non-compliance allegations related to affirmed provisions of its order.

[4] The hearing officer cannot determine from reading the Supreme Court decision how the respondents could have presented as fact their own conclusion of compliance with the reorganization provision of the order therein referenced by the Supreme Court in its decision (pages 10-11) while having knowledge that they had entered into a confidential agreement that would nullify the effect of that reorganization.

The respondents further assert that the exercise of jurisdiction by this administrative tribunal is prohibited through the operation of *res judicata*. This theory requires that the parties must be the same or in privity with one another, that the same cause of action must be before the tribunal, and that the first cause of action must have concluded with a final judgment on the merits. The term "cause of action" means the right to recover and refers to all theories on which relief could be claimed, and which arise out of the same factual transaction in question. However, the doctrine does not apply when the factual circumstances have changed. The basis for the respondents' *res judicata* argument is that the Supreme Court included a factual determination in its decision stating that the respondents had complied with the reorganization requirement in the fall of 2013. However, the issue raised by the BSR is whether actions taken by respondents after the Supreme Court's decision complied with the presiding officer's final decision. This issue could not have been determined in the administrative hearing, nor on appeal, because whatever actions regarding the reorganization that were represented by parties before the Supreme Court simply had not been submitted for fact finding during the administrative proceedings. The court's statement that actions taken in the fall of 2013 complied with the final order does not bar this tribunal from considering whether the respondents' confidential agreement, which sprang into existence upon the Supreme Court's ruling, complies with the final order. Furthermore, the factual circumstances have indeed changed between the time the Supreme Court issued its decision and the BSR filed its motion. Additionally, the underlying BSR motion here also raises issues involving, if not interwoven with, the $17.1 million repayment issue and the conduct of the parties in complying with that corresponding provision of the administrative order. The *res judicata* theory does not apply under these circumstances

Lastly, the respondents also assert that they would be deprived of due process protections if this administrative tribunal exercises jurisdiction to consider the merits of the BSR motion. The respondents assert that each is being denied a statutory due process protection appearing in RSA§421-B:26-a, IV and V that provides a review by the secretary of state of an initial petition submitted by the BSR against a party. As has been stated earlier in this decision, the matter over which the administrative tribunal seeks to exercise jurisdiction is the continuation of administrative proceedings that were initiated by a petition and reviewed by the secretary of state. The respondents maintain that there are new facts alleged in the BSR's underlying motion that have occurred since the final administrative order. That there are facts that arise from "steps" taken by the respondents following the hearing in order to comply with the order is not surprising, but rather expected given the provisions of the order. Any facts that support either the proposition that the respondents have complied with the order or have not complied with the order are viewed as part of this administrative hearing procedure that was initiated by the original BSR petition. The respondents were provided the statutory due process protection of RSA §421-B:24-a, IV, V at that time. They are not entitled to, nor does the BSR have to revert to, a new petition against respondents who have already been afforded due process in extensive adjudicatory proceedings resulting in a final administrative order, the relevant provisions of which have been upheld by the Supreme Court. The jurisdiction at issue here is simply that necessary to determine if the respondents are in compliance with the previously issued order in these proceedings.

The position of the respondents that a new petition is required under these circumstances is not a correct interpretation of law. The multiple filings submitted by all parties throughout these proceedings, the evidence given, the appeal process and the instant motion of the BSR have provided fair notice to the respondents of what is to be heard.

The respondents' motions to dismiss this matter for lack of jurisdiction are denied for the reasons stated. These proceedings will continue as provided in the scheduling order dated April 15, 2014.

So ordered this 24th day of April, 2014

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

SERVICE LIST

cc: Barry Glennon, Esq.

Earle F. Wingate, III, Esq.

Adrian S. Larochelle, Esq.

Michael D. Ramsdell, Esq.

David I. Frydman, Esq.

Andru H. Volinsky, Esq.

Roy W. Tilsley, Jr., Esq.

Christopher G. Aslin, Esq.

Joel Emlen, Esq.

Patrick Closson, Esq.

Courtesy copies to:

J. David Leslie, Esq.

Peter Baylor, Esq.