

STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

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

**HEALTHTRUST’S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO
DENY BSR’S REQUEST FOR ATTORNEYS’ FEES AND COSTS RELATED TO
APPEAL**

INTRODUCTION

The New Hampshire Bureau of Securities Regulation (“BSR”) seeks an award of its attorneys’ fees and costs in this matter, including its attorneys’ fees and costs related to the appeal of the Final Order. HealthTrust does not dispute that, pursuant to RSA 5-B:4-a, V, the Presiding Officer has the authority to award the BSR its reasonable attorneys’ fees and costs for the claims upon which the BSR prevailed in this administrative proceeding.¹ HealthTrust also does not dispute that the appeal of the administrative proceeding was a “related proceeding” within the context of RSA 5-B:4-a, V. However, the Presiding Officer should deny the BSR’s request for attorneys’ fees and costs related to the appeal because only the New Hampshire Supreme Court can award attorneys’ fees and costs related to an appeal.

FACTS

On August 16, 2012, the Presiding Officer issued the Final Order in this case. On September 14, 2012, the BSR filed a motion seeking an award of attorneys’ fees and costs in the amount of \$571,398.86. On October 15, 2012, the BSR filed a supplemental motion seeking the

¹ “Where a party prevails on some claims and not others, and the successful and unsuccessful claims are analytically severable, any fee award should be reduced to exclude time spent on unsuccessful claims.” *LaMontagne Builders, Inc. v. Brooks*, 154 N.H. 252, 261 (2006); *Van Der Stok v. Van Vorhees*, 151 N.H. 679, 685 (2005).

\$571,398.86.² On October 16, 2012, the Local Government Center, Inc. and related entities, including HealthTrust, petitioned the New Hampshire Supreme Court to accept their appeal of the Final Order. On October 17, 2012, the Presiding Officer denied the BSR's motions, without prejudice, and found the motions were not ripe at least until the Supreme Court accepted or declined to accept the appeal.

On January 10, 2014, the Supreme Court issued its decision in the appeal. The BSR prevailed on some, but not all, of the issues raised in the appeal. Regarding the issue of the BSR's demand for attorneys' fees, the Supreme Court vacated the Presiding Officer's award of attorney fees and costs, and remanded the case to him for consideration of the amount of legal fees and costs to be awarded for the administrative proceeding before him. The BSR did not file a motion with the Supreme Court seeking attorneys' fees or costs related to the appeal after the Supreme Court issued its decision,

ARGUMENT

HealthTrust does not dispute that the BSR is entitled to recover reasonable attorneys' fees and costs for the claims upon which it prevailed in this administrative proceeding. RSA 5-B:4-a, V states as follows:

In any investigation to determine whether any person has violated or is about to violate this chapter or any rule or order under this chapter, upon the secretary of state's prevailing at hearing, or the person charged with the violation being found in default, or pursuant to a consent order issued by the secretary of state, the secretary of state shall be entitled to recover the costs of the investigation, and any related proceedings, including reasonable attorney's fees, in addition to any other penalty provided for under this chapter.

RSA 5-B:4-a, V. HealthTrust also does not dispute that the appeal of the Final Order was a "related proceeding[]" within the context of RSA 5-B:4-a, V. *See Simpson v. Young*, 153 N.H. 471, 480 (2006) (appeal constitutes "proceeding" in context of RSA 540-A:4, IX [landlord/tenant

² HealthTrust understands that the BSR now seeks an award in excess of \$930,000.

statute] because it is event between commencement of action and judgment). However, the Presiding Officer should deny the BSR's request for attorneys' fees and costs related to the appeal because only the New Hampshire Supreme Court can award attorneys' fees and costs related to an appeal. *See LaMontagne Builders, Inc. v. Brooks*, 154 N.H. 252, 259 (2006); Supreme Court Rule 23.

In *LaMontagne Builders, Inc.*, the superior court awarded a construction company its attorneys' fees and costs in multiple cases against a development company and its officer ("Brooks") after finding that Brooks raised defenses to payment obligations in bad faith. 154 N.H. at 256. The construction company prevailed on appeal, but "made no request for costs or attorney's fees pursuant to Supreme Court Rule 23." *Id.* Thereafter, the superior court held a hearing on the proper amount of the attorney's fees and costs, and awarded more than \$400,000, including attorney's "fees and expenses incurred in connection with the first appeal." *Id.* at 256-57.

In response to a motion for reconsideration, the superior court reaffirmed its decision, including the award for the first appeal. *Id.* at 257. Brooks appealed the decisions on various grounds, including that the superior court did not have jurisdiction to award attorney's fees and costs related to the Supreme Court appeal. *Id.* In particular, Brooks argued that the superior court could not award attorney's fees related to the first appeal because no request for attorney's fees or costs had been made pursuant to Supreme Court Rule 23. *Id.* at 258.

The Supreme Court separately considered the awards of attorney's fees and costs related to the first appeal. The Court commenced its analysis by quoting Supreme Court Rule 23:

The clerk of the supreme court shall audit and allow bills of costs accruing in this court, and certify the costs to the trial court with the order made in the case....

Costs will be deemed *waived* if a request for taxation of costs with itemization is not filed within 30 days after the date on the order in the case.

In the interest of justice in extraordinary cases, but not as a matter of right, the *supreme court in its sole discretion* may award attorney's fees related to an appeal to a prevailing party if the appeal is deemed by the court to have been frivolous or in bad faith.

Id. (emphasis in opinion). The Supreme Court then found that the superior court lacked the authority to award costs for the appeal:

With respect to the issue of costs pertaining to an appeal, the plain language of Rule 23 is clear: the prevailing party on appeal must file an itemized request for taxation of costs with the clerk of the supreme court within thirty days after the date on the order in the case. *Id.* If the prevailing party fails to file an itemized request in a timely fashion, costs will be deemed waived. *Id.* In this case, LBI did not file a timely request for costs with this court. Consequently, it was improper for the superior court to award costs arising out of the first appeal.

Id.

The Supreme Court also reversed the superior court's award of attorney's fees for the first appeal. The Court commenced its analysis of the issue as follows:

Similarly, with respect to attorney's fees, Supreme Court Rule 23 plainly states that "the supreme court *in its sole discretion* may award attorney's fees related to an appeal." *Id.* (emphasis added [in opinion]).

Id. at 259. The Supreme Court added that: "[t]he rule thus gives this court the *exclusive* authority to award attorney's fees for an appeal, "'if the appeal is deemed ... to have been frivolous or in bad faith.'" *Id.* (quoting Supreme Court Rule 23). The Court found that "LBI made no motion to this court requesting attorney's fees under Rule 23, and therefore procedurally defaulted its opportunity to request fees." *Id.*

In *Johnson v. Wheeler*, 146 N.H. 594 (2001), the Supreme Court considered a request for an award of attorney's fees where there was no claim of bad faith or a frivolous conduct that would have implicated Supreme Court Rule 23. In *Johnson*, the appellants did not dispute that

they had violated the landlord/tenant statute, and therefore, were liable for attorney's fees and costs pursuant to RSA 540-A:4, IX. Instead, the appellants challenged the trial court's award of damages for the statutory violations. *Id.* at 594. Thus, the appeal did not involve a claim of bad faith or frivolous conduct.

Despite the absence of a claim of bad faith or frivolous conduct, the Supreme Court granted the tenant his attorney's fees and costs. When it did so, the Court did not remand the matter to the trial court for a determination of the proper amount of the award. Instead, the Supreme Court stated the proper procedure for securing an award of attorney's fees related to an appeal:

We order the plaintiff to file within thirty (30) days an affidavit detailing the costs and attorneys' fees sought. The defendant shall have thirty (30) days thereafter to respond.

Id. at 597. Thus, the Supreme Court, not the superior court adjudicated the claim for attorney's fees despite the absence of a claim of bad faith or frivolous conduct.

Here, the Presiding Officer has jurisdiction over the BSR's demand for attorneys' fees and costs related to the administrative proceeding. It is only the New Hampshire Supreme Court, and not the Presiding Officer, however, that may award attorneys' fees and costs related to an appeal. Consequently, the Presiding Officer should deny the BSR's request for attorneys' fees and costs related to the appeal of the Final Order.

CONCLUSION

For the foregoing reasons, the Presiding Officer should deny the BSR's request for attorneys' fees and costs related to the appeal. In short, only the New Hampshire Supreme Court can award attorneys' fees and costs related to an appeal.

Respectfully submitted,

HEALTHTRUST, INC.

By Its Attorneys,

Dated: November 10, 2014

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CERTIFICATE OF SERVICE

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

/s/ Michael D. Ramsdell
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