STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

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

OBJECTION TO JOINT MOTIONS TO DISMISS FILED BY HEALTHTRUST INC. AND PROPERTY-LIABILITY TRUST, INC.

NOW COMES Petitioner, the New Hampshire Bureau of Securities Regulation (the "Bureau"), a part of the Corporations Division within the Department of State, by and through counsel, Bernstein, Shur, Sawyer & Nelson, P.A., and respectfully submits this objection to HealthTrust, Inc.'s ("HealthTrust") and Property-Liability Trust, Inc.'s ("PLT") motions to dismiss the Bureau's pending Motion for Entry of Default Order. Respondents' motions to dismiss fail because: (1) RSA chapter 5-B grants the Presiding Officer implicit authority to enforce the penalty provisions of his Final Order; and (2) alternatively, the Presiding Officer retained jurisdiction to enforce the Final Order and Respondents did not challenge this portion of the order.

Background

On September 2, 2011, the Secretary of State, William M. Gardner, issued an order to Cease and Desist, an Order to Show Cause, and a Hearing Order in response to a September 2, 2011 Staff Petition that accused Respondents of violating RSA chapter 5-B and RSA chapter

421-B, which Staff Petition was subsequently amended (the "Petition").[1] Following a ten-day hearing on the Petition, a final administrative order was issued on August 16, 2012 (the "Final Order"), in which Respondents were found in violation of certain aspects of RSA chapter 5-B. The Respondents sought reconsideration and rehearing and then timely filed a Rule 10 Appeal Petition with the New Hampshire Supreme Court on October 15, 2012, challenging portions of the Final Order pursuant to RSA 5-B:4-a.

On January 10, 2014, the New Hampshire Supreme Court issued a decision in Respondents' appeal of the above matter, upholding substantially all of the Final Order with the exception of those portions that concerned the prospective setting of reserve levels and the prospective purchase of reinsurance. The Court remanded the matter to the Presiding Officer for the purpose of re-determining the payment of Petitioner's fees by Respondents. The January 10th decision did not become final until the expiration of the time for reconsideration. Sup. Ct. R. 22.

On or around October 28 and 29, 2013, and well before the Supreme Court's decision on appeal, HealthTrust and PLT entered into a clandestine agreement (the "Secret Agreement") whereby in the event the Supreme Court ruled against Respondents, the terms of the agreement would become operative. Pursuant to the Secret Agreement, on January 10, 2014, the date of the Court's decision, all of PLT's assets, liabilities, staff, and operations were transferred to HealthTrust purportedly in full satisfaction of the $17.1 million debt owed to HealthTrust by PLT pursuant to the Final Order. See Final Order at 78, ¶ 13.

The Secret Agreement, and the transfers made thereunder, directly violated provisions of the Final Order that required the LGC to separate into entities governed by independent boards

[1] For ease of reference, this objection does not distinguish between the former LGC entities and the current HealthTrust and PLT entities because the latter are successors in interest of the former.

that operated under separate bylaws to ensure that the former property liability/workers compensation risk pool was no longer a part of the same corporate entity that ran the health coverage risk pool. Final Order at 73, ¶ 1. Consequently, the Bureau filed the disputed Motion for Entry of Default Order. The Bureau's Motion requests that the Presiding Officer issue an order finding Respondents in violation of the Final Order and RSA chapter 5-B, and directing Respondents to cease and desist operating as RSA chapter 5-B pools, as they are no longer eligible for the statutory protections of RSA 5-B:6. In response to the Bureau's Motion, HealthTrust and PLT filed the instant motions to dismiss, arguing that the Presiding Officer lacks jurisdiction to grant the Bureau's requested relief. Respondents' motions to dismiss fail, however, because RSA chapter 5-B grants the Presiding Officer direct and implicit authority to enforce the penalty provisions of his Final Order. Additionally, Respondents' contention that the Bureau's Motion denies them procedural due process protections is without merit and should be summarily rejected.

Argument

I. RSA CHAPTER 5-B AND RSA CHAPTER 421-B GRANT THE PRESIDING OFFICER FULL IMPLICIT AUTHORITY TO IMPLEMENT AND ENFORCE THE PENALTY PROVISIONS OF THE FINAL ORDER.

A. *The penalty of forfeiture of 5-B status is an approved remedy, which the Presiding Officer has full implicit authority to enforce.*

In RSA 5-B:4-a, the legislature granted the Secretary of State "exclusive authority and jurisdiction: (a) [t]o bring administrative actions to enforce . . . chapter [5-B]," and "(b) [t]o investigate and impose penalties for violations of . . . chapter [5-B]." RSA 5-B:4-a, I (a)-(b) (emphasis added). Further, the legislature granted "[t]he secretary of state . . . all powers specifically granted or reasonably implied in order to perform the substantive responsibilities

imposed by [RSA chapter 5-B]." Id. at II (emphasis added). Here, the Presiding Officer's Final Order warned Respondents that "[f]ailing timely reorganization as ordered in § 1" of the Order, the LGC is in continuing violation of RSA chapter 5-B and the Final Order, which violation would "be penalized by forfeiture of the statutory exemption from State's insurance laws and of the exemption from state taxation granted pursuant to RSA 5-B:6 as [neither] it, nor any existing insurance program as presently operated by LGC, Inc. [would] be deemed to be a 'pooled risk management program as defined by RSA 5-B.'" Final Order at 73, ¶ 2. Because Respondents did not challenge the Presiding Officer's authority to impose the penalty of forfeiture and because enforcement of the penalty provision of the Final Order is a reasonably implied power necessary to perform the substantive responsibilities imposed by RSA chapter 5-B, Respondents' jurisdictional challenge fails.

"The authority of an administrative agency is not limited to that which is expressly granted. It also encompasses those implied powers which are reasonably necessary or appropriate to fully effectuate the legislative intent." Matter of Valley Road Sewerage Co., 685 A.2d 11, 16 (N.J. Super. Ct. App. Div. 1996) (concluding that Board of Public Utilities properly exercised its authority when it compelled owner and director to divest themselves of their interest in a sewer utility following the Board's decision revoking the utility's operating authority and franchise). "The grant of authority to an administrative agency is to be liberally construed in order to enable the agency to accomplish its statutory responsibilities." Id.; see also In re JAMAR, 145 N.H. 152, 155 (2000) (citing 2 Am.Jur.2d Administrative Law § 62, at 83-84 (1994)) ("[B]ecause the legislature cannot anticipate all of the problems incidental to the carrying out of administrative duties, administrative entities generally have the implied or incidental powers reasonably necessary to carry out the powers expressly granted to them.").

This encompasses "such implied powers as are necessary and fairly appropriate to make effective the express powers granted to, or duties imposed on" the agency. 73 C.J.S. Public Administrative Law and Procedure § 109.

Respondents' reliance on In re Chase Home for Children, 155 N.H. 528 (2007) and similar cases is unavailing. In Chase there was no statutory authority to impose prospective penalties at all, the only statutory authority was to determine the proper rate. Id. The authority of the Secretary under RSA chapter 5-B is clearly distinguishable. The Legislature granted the Secretary of State "exclusive authority and jurisdiction: (a) [t]o bring administrative actions to enforce . . . chapter [5-B]," and "(b) [t]o investigate and impose penalties for violations of . . . chapter [5-B]." RSA 5-B:4-a, I (a)-(b) (emphasis added). Additionally, here the Supreme Court has already upheld the penalties imposed in the Final Order.

Similarly, Respondents' reliance on E.D Swett, Inc. v. N.H. Commission for Human Rights, 124 N.H. 404 (1983) is misplaced. In E.D. Swett, Inc., the Commission appealed the superior court's order, which approved the Master's "recommendation that awards of compensatory damages and counsel fees made against the plaintiff . . . be set aside" because the commission lacked statutory authority to grant such awards. Id. at 407-408. On appeal, the Court rejected the Commission's argument that although not expressly authorized by RSA 354-A:9, II, "these types of awards are well within the commission's authority . . . to require [Plaintiff] 'to take such affirmative action[,] as in the judgment of the commission, will effectuate the purpose of this chapter.'" Id. at 411 (ellipsis omitted). The Court explained that "[a]lthough the statute [RSA 354-A:9, II] states 'such affirmative action *including (but not limited to)*' (emphasis added) and it is argued that these words are expansive rather than restrictive, . . . the varied examples of relief which RSA 354-A:9, II does expressly authorize the

commission to order are all equitable in nature." Id. at 411-12. Thus, the Court declined to conclude that the statute "enlarge[d] the commission's authority so as to encompass other forms of relief such as compensatory damages." Id. at 412. The Court reversed the lower court's determination with regards to the commission's award of reasonable attorney's fees, however, because an "award in appropriate cases is consistent with the discretion granted the commission in fashioning equitable remedies in view of the legislative purpose behind the statute."

Here, RSA 5-B:4-a grants the Secretary of State "exclusive authority and jurisdiction . . . [t]o investigate and impose penalties for violations of this chapter, including but not limited to: (1) Fines" and "(2) Rescission, restitution, or disgorgement."[2] RSA 5-B:4-a, I (b) (1)-(2) (emphasis added). The "including but not limited to" language suggests that the listed penalties are not exclusive. Moreover, unlike in E.D. Swett, Inc., the penalties that the statute expressly authorizes are not all of the same class. The Secretary is given broad discretion to take action to remedy non-compliance with RSA chapter 5-B. Finally, the remedy of forfeiture is particularly appropriate in this matter because the Respondents fully accepted the penalty as appropriate and did not appeal this portion of the Final Order. Thus, where the Human Rights Commission's authority is limited to dispensing equitable relief, the Secretary's authority is not similarly limited, and E.D. Swett, Inc. is not controlling.

In the instant matter, the legislature specifically granted the secretary of state, or his designee, the Presiding Officer, "all powers specifically granted or reasonably implied in order to perform the substantive responsibilities imposed by this chapter." RSA 5-B:4-a, II (emphasis added). Although there is no concrete test for determining a reasonably implied power, "administrative agencies do not exceed their jurisdiction when they exercise their implied

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[2] RSA 5-B:4-a further permits an award of "the costs of the investigation . . . including reasonable attorney's fees." RSA 5-B:4-a, V.

authority to do all which is reasonably necessary to effectuate express duties." Hawes v. Colorado Division of Insurance, 65 P.3d 1008, 1017 (Colo. 2003) (noting that "whether a power to be exercised by an agency is a reasonably necessary one cannot be something that is a matter of law. Rather, it is a mixed question of law and fact").

To determine what is necessary, the Presiding Officer should:

> first look to the nature of the administrative proceeding: including whether private or public interests are at stake; whether remedies sought are those traditionally at law or in equity; and whether it is a quasi-legislative or quasi-adjudicatory proceeding. Second, [the Presiding Officer should] evaluate whether the circumstances, in relation to the type of proceeding, require the agency to exercise its implied and incidental powers.

Id. at 1017-18.

Here, one of the Secretary's express duties is to "impose penalties for violations" of RSA chapter 5-B. RSA 5-B:4-a. The obvious import of this duty is to encourage compliance with the requirements of RSA chapter 5-B. The requirements of 5-B exist to protect the public good as risk pools exercise essential governmental functions and their fidelity to the standards set out in RSA 5-B:5 require some degree of vigilance, as evidenced by the facts adduced at the trial in this matter. It would be of little utility to the operation of these important regulatory functions if the risk pools under regulation by the Secretary of State need only temporarily comply with the Secretary's final orders. The scenario conjured by the Respondents' legal arguments would permit a risk pool to comply with a final order that is fully approved on appeal for a day and then return immediately to a non-compliant position. Under the Respondents' argument, the Secretary would then be required to commence an entirely new administrative proceeding, subject to hearings and appeals, before compliance could then again be attained, albeit only for a moment. This process, envisioned and required by the Respondents' theory of administrative law would require multiple multi-year administrative proceedings to gain only temporary

compliance with RSA chapter 5-B. By the same token, the public's interests would only be temporarily and intermittently protected. This could not have been the intent of the Legislature, and this is not a fair reading of the relevant law.

The imposition of the penalty – forfeiture of the statutory exemption – is a power that is reasonably necessary to carrying out the express authority conferred by the statute. An implied power of forfeiting the protected status of a risk pool is clearly implicit and in line with the Legislature's description of the standards to be a risk pool in the first place under RSA 5-B:5. Additionally, the exercise of this implied power is essential to protecting the public interest, which is clearly at stake in this administrative proceeding. See RSA 5-B:1 (noting that RSA chapter 5-B was "established for the benefit of political subdivisions of the state.").

The implicit nature of the Presiding Officer's authority is further evidenced by the absence of any other enforcement mechanism in either RSA chapter 5-B or RSA chapter 421-B. RSA Chapter 421-B does not include a limiting or conflicting alternative enforcement provision. Instead, the only reference to a non-appellate court avenue is in RSA 421-B:22, which concerns procedural rather than substantive challenges. See RSA 421-B:22, III (providing that when a person refuses to comply with a subpoena issued by the secretary of state, "upon application . . . [the court] may issue to the person an order directing him or her to appear before the secretary of state, or the officer designated by him or her, to produce documentary evidence if so ordered or to give evidence touching the matter under investigation or in question."). The absence of an alternative enforcement mechanism is further comprehended when considered in the context of the secretary's "exclusive authority and jurisdiction" to "impose penalties for violations of [RSA chapter 5-B]." RSA 5-B:4-a. Judicial enforcement is not required by the relevant statutes and further, the Bureau's Motion to Enforce does not request the Presiding Officer to compel the

Respondents to take any affirmative action. The Motion merely seeks forfeiture of the Respondents' 5-B status as a result of Respondents' non-compliance with both RSA 5-B and the Final Order. The Respondents could have complied with the Final Order, or if changes in circumstances justified it, the Respondents could have sought relief from the Final Order. HealthTrust and PLT did neither and now the stated penalty should be imposed.

B. *Respondents' position leads to absurd results, which are inconsistent with legislative prudence.*

Respondents contend that RSA chapter 5-B and RSA chapter 421-B prohibit the Presiding Officer from ensuring that they comply with his Final Order, which was the product of an arduous and lengthy administrative process. Following this line of thought to its "logical" end, Respondents essentially advocate for a statute that can never fully be enforced. Under this impractical regime, which Respondents advance, cease and desist orders would issue to pooled risk management programs that violate RSA chapter 5-B. RSA 5-B:4-a, VI. These programs would then be afforded a hearing, conducted in accordance with RSA chapter 421-B. Id. Following involved, complex adjudicatory proceedings, an order would issue. That order would be subject to appeal. Then, as Respondents did here, the pooled risk management program would comply with the order for a short period of time, while the appeal is pending, only to alter its course and return to non-compliance as soon as the Supreme Court has ruled. According to Respondents, the only way to force compliance on an entity that chooses to play this cat and mouse game would be to re-start the entire process by filing a new cease and desist order. Such a nonsensical statutory regime would allow entities, like Respondents, to continually avoid a presiding officer's order and the agency's authority by periodically satisfying the directives of

the order, only to just as quickly subvert the agency's authority, change course, and violate the order and statute.

Respondents rely on Appeal of Somersworth School District, 142 N.H. 837 (1998), to suggest that unlike the Public Employees Labor Relations Board, who must initiate a separate proceeding to compel compliance with its order, see id. at 841, "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." HealthTrust's Memo. of Law at p. 10. Rather, Respondents argue, "[t]he statutory scheme requires that the Secretary initiate a separate proceeding . . . ." Id. Respondents' analysis, however, fails to consider the Court's conclusion in Somersworth, that "[t]he legislature . . . did not give the PELRB the ability to utilize an equitable remedy to bring [the employees'] claim within its jurisdiction . . . ."[3] Here, not only does Respondents' conduct fall within the exclusive jurisdiction of the Secretary, but in the instant action, the legislature explicitly authorized the Secretary to enforce the statute and impose penalties for violations of same.

The Bureau does not seek to extend its powers to seek enforcement for an unlimited time, although that argument would be justified. In the instant matter, the case and controversy between the Respondents and the Bureau was still live when the Respondents ended their temporary compliance. The Respondents voted to violate the Final Order while the order was on appeal. The Respondents effectuated their votes, by returning to non-compliance, just as soon as the Supreme Court ruled in this matter and before any reconsideration period for that

[3] Here, unlike in Somersworth, there is no dispute that the Secretary has general jurisdiction to address the Secret Agreement and Respondents' continued failure to comply with the Final Order. See Somersworth, 142 N.H. at 841 (noting that the employee's claim did not even fall within the PELRB's jurisdiction because he was not covered by the collective bargaining agreement).

ruling had expired.[4] As HealthTrust notes in its motion, HealthTrust and PLT executed the Secret Agreement on October 28 and 29, 2013, and the agreement became operative on January 10, 2014, the date of the Supreme Court's opinion affirming, in large part, the Presiding Officer's Final Order. See HealthTrust's Memo. of Law at pp. 2-3.[5] Under these circumstances, the argument that RSA chapter 5-B and/or RSA chapter 421-B strip the Presiding Officer of his ability to ensure compliance with an ongoing administrative matter, creates an illogical statutory scheme, and therefore, the argument should be rejected. Accordingly, Respondents' motions fail.

II. THE PRESIDING OFFICER RETAINED JURISDICTION IN HIS SELF-ENFORCING FINAL ORDER.

The Final Order required that "[n]o later than 90 days from the date of this Order, the 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, ¶ 1. Additionally, the Final Order provided that failure to comply would result in "forfeiture of the statutory exemption" afforded by RSA 5-B:6. Id. at ¶ 2. By giving Respondents a timeline by which to achieve compliance, the Presiding Officer directly retained jurisdiction to, at the very least, determine whether Respondents timely reorganized. The Respondents did not appeal the Presiding Officer's retention of jurisdiction or the portion of the Final Order that required the forfeiture upon failure to comply.

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[4] One might wonder if the Respondents' actions were timed and staged to curry favor while the appeal was pending.

[5] Because Respondents did not waive the ten (10) day reconsideration period following the Supreme Court's January 10, 2014 decision, the Court's ruling did not become final until January 20, 2014. See Sup. Ct. R. 22(2).

Moreover, because Respondents never challenged the Final Order's provision that they achieve compliance within 90 days, they implicitly agreed to the continuing jurisdiction of the Presiding Officer for the portions of the Final Order that were not appealed.[6]

In the same vein, at this stage of the proceedings, the Presiding Officer's penalty is self-effectuating. Respondents only briefly complied with the Presiding Officer's command, "organiz[ing] its two pooled management programs into a form that provides each program with an independent board and its own set of written bylaws," for a period of only eleven months; that is; while the appeal was pending. A fair reading of the Final Order, and the Respondents' failure to appeal same, is not that the compliance demanded would only be momentary or for purposes of show during an appeal. The consequence of Respondents' failure to maintain good faith compliance is the imposition of a "forfeiture of the statutory exemption." Order at 73, ¶ 2.

The imposition of the forfeiture of their status as an exempt risk pool should not come as a surprise to Respondents. Respondents initially appealed both the mandate to reorganize and the corresponding penalty to the New Hampshire Supreme Court, as is evidenced in their Rule 10 Appeal Petition. The Respondents ultimately withdrew these issues from their appeal, however, and confirmed their intentional decision not to appeal these issues during the oral argument conducted on November 14, 2013. Having had the opportunity to challenge both the mandate and the corresponding penalty, and having expressly abandoned such opportunity,

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[6] The Final Order was issued on August 16, 2012 and therefore, the LGC's compliance was required by November 14, 2012. Respondents subsequently moved for reconsideration of the Final Order on or around September 14, 2012. The Presiding Officer denied the Motion on September 24, 2012. Thus, the Presiding Officer *and* Respondents anticipated that the 90-day compliance period would extend beyond the termination of the reconsideration period and even into the appellate period. In fact, such an arrangement was beneficial to Respondents as it provided them a reasonable period to reorganize.

Respondents cannot now cry foul when the prescribed penalty is imposed. Accordingly, the Presiding Officer should deny Respondents' motions to dismiss.

III. RESPONDENTS' DUE PROCESS ARGUMENT IS WITHOUT MERIT.

Finally, Respondents' contention that the Motion for Entry of Default Order denies them the procedural protection of review by the Secretary lacks merit. As explained infra, despite Respondents' mischaracterization of the Motion, this is not an attempt by the Bureau to bring a new enforcement action, which would require issuance of a new cease and desist order pursuant to RSA 5-B:4-a, VI. Rather, the Motion merely effectuates the penalty previously stated in the Presiding Officer's Final Order: "forfeiture of the statutory exemption from [the] State's insurance laws and of the exemption from state taxation granted pursuant to RSA 5-B:6[,]" Final Order at 73, ¶ 2. Respondents, therefore, had adequate notice that their failure to "timely reorganize as ordered in § 1 [of the Final Order]" would result in forfeiture of their statutory exemption and all of the benefits afforded said status. The decision to unilaterally re-construe the portion of the Final Order that required repayment of the $17.1 million illegal subsidy further complicates Respondents' positions as this unilateral action appears to directly flout the directives of the Presiding Officer and the Secretary. As well, the Respondents never sought relief from the Final Order from the Presiding Officer, so claims of changed circumstances or a denial of process in which a change in circumstances could have been argued, are to no avail.

Conclusion

For the reasons stated herein, the Bureau respectfully requests that the Presiding Officer deny HealthTrust's and PLT's motions to dismiss.

Respectfully submitted,

The Bureau of Securities Regulations
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By its attorneys,
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Dated this 4th day of April, 2014

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Certificate of Service

I hereby certify that I have served a copy of this objection upon counsel for the LGC successor entities by U.S. Mail and electronically this 4th day of April, 2014, those counsel being William Saturley, Brian Quirk, Michael Ramsdell, David Frydman, Patrick Closson, Peter Baylor, and J. David Leslie.

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