STATE OF NEW HAMPSHIRE

DEPARTMENT OF STATE

IN THE MATTER OF:	
Local Government Center, Inc.; Local 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; Paula Adriance; John P. Bohenko; and John Andrews RESPONDENTS	Case No.: 2011000036

<u>FINAL ORDER</u>

PROCEDURAL BACKGROUND

The underlying matter arises from a staff petition, as amended, submitted by the Bureau of Securities Regulation ("BSR") alleging that the named respondents undertook a series of acts and omissions resulting in violations of New Hampshire law, namely RSA 5-B, entitled "Pooled Risk Management Programs" and RSA 421-B, entitled "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 petition was timely amended and presented in more detail. The actions alleged in the BSR petition generally relate to the formation, organization and operation of several related entities, referenced generally as the Local Government Center, Inc. ("LGC") and certain of its affiliated and LGC controlled organizations, and originally of two individuals who have held the position of executive director of the LGC, and several of its board members in connection with the structure and operation of pooled risk management programs. The actions alleged in the BSR petition also relate to the legality of certain expenditures by LGC and its affiliates, particularly funds contributed by municipalities and employees of municipalities to obtain risk management services and insurance coverage. Among these health services and products were medical and dental insurance coverage plans provided through agreements between the LGC and those public employers or "political subdivisions" as referred to in RSA 5-B:2, III.

On November 3, 2011 an order issued denying intervenor status to several public employee unions that wished to participate as parties in this administrative proceeding.[1] On March 30, 2012 an order issued granting the BSR motion withdrawing Count VI of its amended petition that alleged the respondents' actions constituted a civil conspiracy. At the time of the hearing several orders had issued granting motions of the Bureau of Securities Regulation ("BSR") requesting a voluntary non-suit and consequent withdrawal of complaints against all individuals originally named as respondents except: the present executive director, Maura Carroll; and Peter Curro, a long-time member of the board of directors.

[1] Professional Firefighters of New Hampshire, New England Police Benevolent Association, Service Employees International Union – SEA, Council 1984; National Education Association – NH; American Federation of Teachers-NH; American Federation of State County and Municipal Employees, Council 93

Over the period of time following the notice of hearing on September 2, 2011 through the beginning of the evidentiary hearing, the presiding officer was required by the actions of the parties' counsel to issue some fifty (50) prehearing and preliminary orders addressing: scheduling differences; addressing evidence discovery disputes; prohibiting attempt by other parties to intervene in the proceedings; prohibiting testimony by certain opposing witnesses; limiting testimony of certain opposing witnesses; issuing subpoena orders to witnesses and denying other subpoena orders sought; clarifying previous orders, allowing out of state counsel to join in the representation of parties and participate at hearing; considering dispositive motions at four stages in the proceeding; and resolving conflicting production ideas related to live video-streaming of the evidentiary hearing.[2]

The final evidentiary hearing was conducted on sequential days from April 30, 2012 through May 11, 2012, excluding the intervening weekend in Concord, New Hampshire, with all parties represented by legal counsel. That hearing resulted in over 2,437 pages of transcribed dialogue and the submission of approximately 8,000 pages of exhibit documents. The respondents, by previous agreement among themselves, elected to integrate the presentation of their individual cases in chief. As the BSR presented its case, each of the respondents were given the opportunity to cross examine witnesses and to challenge the admission of exhibits offered by the BSR. Upon the completion of the BSR's case, the respondents proceeded with their integrated approach in offering their own witnesses, eliciting testimony of witnesses called by other respondents and offering exhibits for admittance. Each party was given the opportunity to present an oral opening and throughout the conduct of the hearing to present evidence, witnesses and conduct cross-examination. Oral motions and objections occurred

[2] An index and copy of all filings and orders appears at this link: http://www.sos.nh.gov/locgovctr/index.html

during the course of the hearing that the hearing officer considered and made oral rulings as appropriate to administrative evidentiary hearings.

By prior arrangement post-hearing legal memoranda were permitted in place of oral closings. However, respondents did undertake oral argument on dispositive motions. These oral arguments were essentially similar to prior dispositive motions and served a purpose similar to a closing argument. The BSR also argued its objections to the motions being made at the end of the hearing. Rulings on those dispositive motions were taken under advisement and are incorporated into this instant decision. Submission of enumerated statements of fact and findings of law were expressly not requested by the hearing officer. At the request of counsel for LGC on the next to last day of evidence and with the assent of all other counsel, the previously agreed dates for submission of legal memoranda and submission of response briefs were extended to June 4, 2012 and June 7, 2012, respectively. Upon timely receipt of those memoranda, the record was thereafter closed. All appropriate prior findings and determinations made in previous orders are incorporated into the findings and determinations appearing within this order as appropriate. After reviewing the evidence presented, considering the credibility of each witness and qualifications of those offered as expert witnesses, assigning appropriate weight to the evidence submitted, and considering the legal arguments made by each party's counsel I find the facts appearing in the following discussion to be true and legally sufficient to support the decision and accompanying order.

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). The presiding officer has the authority to regulate and control the course of the administrative proceedings and dispose of procedural requests. (RSA 421-B:26-a, XIV). The presiding officer may rule upon a motion when made or may defer decision until a later time in the hearing, or until after the conclusion of the hearing. (RSA 421-B:26-a, XIX). The provisions of RSA 541-A do not apply to these proceedings. (RSA 421-B:26-a, I). Following the hearing, the presiding officer may order penalties and fines as relief including rescission, restitution or disgorgement. (RSA 5-B:4-a, VII).

SUMMARY

This matter arises from allegations in a petition brought by the Bureau of Securities against the several institutional respondents, collectively referred to as "LGC, Inc. and its entities" and two remaining individual respondents[3] pursuant to RSA 421-B:26-a. The BSR alleges that actions undertaken by the respondents violate provisions of RSA 5-B, the "Pooled Risk Management Program Statute" related to: (1) the organizations that were formed to operate each pooled risk management program and the governance over each pooled risk management program; and (2) the operation of the pooled risk management programs by the respondents in a manner that allowed unpermitted expenditures of pooled risk management program funds by the LGC, Inc. that has resulted in an excess accumulation of funds and a failure to return all appropriate funds to the political subdivisions which were members of the health pooled risk management program and the property liability pooled risk

[3] At the outset of the proceedings there were eleven additional individuals named as respondents who, over the course of the proceedings, were released after entering settlement agreements with the BSR (9), or by reason of severe ill health (1), and death (1), and complaints against them were withdrawn prior to this decision.

management program. Based upon the evidence and applicable law the respondents collectively referred to as the "LGC and its entities" have violated the provisions of this statute which was enacted especially for the benefit of the state's political subdivisions.

The organizational violations of RSA 5-B:5, I (b) and (e) result from its failure to meet and maintain standards required by this statute to operate each pooled risk management program at all times consistent with a governing board and governing by-laws of a legal entity organized under New Hampshire law. These violations result from structuring the institutional relationship among the LGC and its several entities in a manner that establishes a hierarchy of interests which serves to diminish the priority interest and benefits each pooled risk management program was intended, by the statute, to receive through its own governance. The organizational relationship also results in a conglomerate imbued with conflicts of interest adverse to the required standards for operation of each pooled risk management program.

These operational violations of RSA 5-B:5, I (c) result from the actions and practices of the LGC, Inc. and its entities that improperly accrued and retained unnecessary surplus funds, improperly transferred assets and improperly expended funds for purposes beyond those permitted in the statute, and failure to return excess funds to political subdivisions which are members of each individual pooled risk management program. There is insufficient evidence to establish that the personal conduct of the individuals named as respondents, Maura Carroll and Peter Curro, can be found to violate the provisions of RSA 5-B and all violations of RSA 5-B alleged against these two individuals are dismissed.

The BSR also alleges that actions undertaken by the respondents violate certain provisions of RSA 421-B, the "Securities Act," related to two forms of securities: (1) pooled risk management

program agreements with political subdivision members; and (2) New Hampshire Municipal Association, LLC membership agreements. These violations concern various aspects of issuing, reporting, offering, marketing, brokering and selling these agreements by the several institutional and individual respondents. Based upon the evidence and the applicable law neither of these agreements are found to constitute securities. The NHMA LLC membership agreements are not deemed securities because there was insufficient evidence produced to establish the existence of any written agreement beyond an annual request that a member's dues be paid and that payment of those dues were required to participate in the pooled risk membership programs. The pooled risk management program agreements are not deemed securities as they lack a legally sufficient "expectation of profit" that the law requires of securities. Since all the violations of the securities law alleged depend upon the underlying determination that the agreements are securities, all violations of RSA 421-B alleged against all respondents are dismissed.

DECISION

Pooled risk management programs

The so-called "Pooled Risk Management Program Statute," RSA 5-B, which is central to consideration of the BSR's allegations against the respondents became effective on July 24, 1987. Prior to that time while there were statutes relating to for-profit insurance providers there was some question as to whether the so-called "pooled risk management programs" at issue in these proceedings were subject to the requirements of the existing insurance statute or subject to taxation. At that time what was known as the New Hampshire Municipal Association, Inc. (NHMA, Inc.) was a not-for-profit New

Hampshire corporation that provided lobbying and legislative services for its members as well as legal counsel and training events. It also provided administrative support to certain affiliate associations comprised of municipal managers, department heads and other local government administrators.

The violations of the statutory provisions RSA 5-B:5, I (b) and (e) to follow are approached through an examination and determination of the manner by which the several not-for-profit organizations were legally structured and organized, and of the manner by which their organizational relationships deviated from the standards of governance expressed in those provisions of the statute.

By 1987, the NHMA, Inc. had created a New Hampshire not-for-profit corporation to provide pooled health insurance coverage for member political subdivisions, the NHMA Health Insurance Trust, Inc. incorporated on February 11, 1985. It also had created a separate New Hampshire not-for-profit corporation, the NHMA Property Liability Trust, Inc. incorporated on June 3, 1986. Each was characterized as an "affiliate" of the NHMA, Inc. by its then executive director, John Andrews. Andrews also became executive director of the later created LGC, Inc. and was assigned responsibility for the operation of all entities of what was to become a conglomerate enterprise under the sole governance of LGC, Inc.

At the time RSA 5-B became law in 1987, the NHMA Health Trust, Inc. (also referred to broadly as the "health trust") and the NHMA Property Liability Trust, Inc., (also referred to broadly as the "property liability trust") each was governed under its own corporate by-laws by its own separate board of trustees that was responsible for policy and for expending its own pooled risk management program's funds. Such pooled risk management programs offer an alternative to traditional, single employer, insurance programs. Each of these corporations operated a pooled risk management program through

which political subdivisions *e.g.* municipalities, counties, school districts, could combine or "pool" as one customer and obtain insurance coverage and risk management in return for the payment of an assigned premium rate to either the NHMA Health Trust, Inc. or to the NHMA Property Liability Trust, Inc. or to both if seeking both types of insurance coverage.

Until passage of RSA 5-B there was no specific law addressing these pooled risk management programs operated by not-for-profit organizations.[4] Upon its passage, all pooled risk management programs became subject to its standards and requirements. Because each program was designated as a not-for-profit New Hampshire corporation, each of these entities submitted certain annual informational filings with the office of the secretary of state. However, until RSA 5-B was amended in 2010[5] there was no requirement or authority within the divisions of the office of the secretary of state, now known as the department of state, to review the programmatic operation, program performance or to investigate these pooled risk management programs. These programs operated within their separate corporations until a complete reorganization was undertaken by LGC, Inc in 2003 when the assets of each of the pooled risk management programs were taken under direct control of the board and staff of the LGC, Inc. At that time, there was also no requirement that the office of the secretary of state review and validate filings of federal Internal Revenue Service, IRC section 115 government income exclusion forms filed with it, beyond determining if the corporation was filing as a not-for-profit corporation. The NHMA, Inc., in the person of its executive director, John Andrews, who was an attorney, wrote the

[4] Also at that time there were two other insurance pooled risk management programs serving local government entities within the state that were not affiliated with NHMA, Inc.

[5] RSA 5-B:4-a

proposed legislation that was submitted to the legislature through the sponsorship of at least one of its board members, Representative Robert Wheeler, and that effort eventually became RSA 5-B in 1987.

In this statute the legislature expressed the purpose of "pooled risk management programs" by stating "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…" and by providing further that the "pooled risk management programs that meet the standards established by this chapter not be subject to insurance regulation and taxation by the state." RSA 5-B:1. The statute allows that the pooled risk management program agreements may, "provide for pooling of self-insurance reserves, risks, claims and losses, and of administrative services and expenses associated with them among political subdivisions." RSA 5-B:3, I. Political subdivisions are defined in the statute 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 or funded by any of the above-named governmental units." RSA 5-B:2, III.

There are standards established by the statute relevant to the matters at issue in these proceedings. Three of these standards focus on the pooled risk management program's organization and governance and provide that it, (1) be a legal entity organized under New Hampshire law;[6] (2) be governed by a board;[7] and, (3) be governed by written bylaws.[8] The allegations that these three statutory requirements were violated generally form the basis of Count I of the BSR's petition.

[6] RSA 5-B:5, I(a)
[7] RSA 5-B:5, I(b)
[8] RSA 5-B:5, I (e)

Several other standards pertain to the operation of the pooled risk management programs by the respondents and generally form the basis of Count II of the BSR's petition. These operational standards provide that a pooled risk management program, (1) return all excess earnings and surplus to the participating political subdivisions;[9] (2) provide an annual audit of financial transactions by an independent certified public accountant to the department of state and to [pooled risk management program] participants;[10] and, (3) provide an annual actuarial evaluation of the pooled risk management program to the department of state and to its participants.[11]

Structure and Governance

This portion of the decision calls for the interpretation and application of three provisions of RSA 5-B. These provisions require that "each program" be a legal entity organized under New Hampshire law pursuant to RSA 5-B:5, I (a). Each program also must be governed by a board pursuant to RSA 5-B:5, I (b); and be governed by written by-laws RSA 5-B:5, I (e). The LGC, Inc., the successor to NHMA, Inc.[12], was also a New Hampshire corporation that was governed by a separate board and written by-laws. At the time of the legislature's consideration of the provisions of RSA 5-B in 1987, each pooled program and the NHMA, Inc. was a New Hampshire legal entity, *i.e.* not-for-profit corporations, each governed by a board and governed by written bylaws. Three legal entities, three separate governing boards, three sets of written by-laws.

[9] RSA 5-B:5, I (c)
[10] RSA 5-B:5, I (d)
[11] RSA 5-B:5, I (f)
[12] In 2003 the New Hampshire Municipal Association, Inc. changed its name to the Local Government Center, Inc. after the Local Government Center, Inc. had changed its name to the Local Government Center Real Estate, Inc.

NHMA, Inc. created the New Hampshire Health Insurance Trust, Inc., also a New Hampshire not-for-profit corporation on February 13, 1985 and later on June 3, 1986 it created the New Hampshire Property Liability Trust, Inc., another New Hampshire not-for-profit corporation. After each entity's creation, the so-called "health trust" and "property liability trust" operated what would later be characterized in 1987 by RSA 5-B as a "pooled risk management program." Each of these programs was housed in a separate corporation with a governing board comprised of directors or trustees, separate from the other and separate from NHMA, Inc. Each of these corporations operated a separate insurance program and served memberships that were not identical. With the passage of RSA 5-B both the health trust and the property liability trust became subject to its provisions through the affirmation clause of that statute.[13]

Thereafter NHMA, Inc. embarked upon a series of actions that are alleged by the BSR to have resulted in the violation of certain requirements of that statute. The evidence reveals a complex, if not convoluted, history of changes and attempted changes to the organizational structure and governance of the pooled risk management program corporations by what is now known as the LGC, Inc. and its related entities (See Joint Exhibit #2 for timeline depicting certain organizational actions for the period 2002-2010 attached to this decision). The LGC, Inc. and its related entities now, and since 2003, may essentially be viewed as a business conglomerate. As of December 31, 2010, the last date for which financial statements were provided as evidence at hearing, it consisted of eight related entities: Local Government Center, Inc.; Local Government Center HealthTrust, LLC; the original Health Trust, Inc. (dissolved during a period of 2006-2011); Local Government Center Property-Liability Trust, LLC; the original New Hampshire Municipal Association Property Liability Trust, Inc. (dissolved during a period

[13] RSA 5-B:1

of 2006-2011); Local Government Center Workers Compensation Trust LLC, merged into the Local Government Center Property Liability Trust, LLC in 2007; Local Government Center Real Estate, Inc.; and the New Hampshire Municipal Association, LLC.

In 2003 the LGC, Inc. attempted to implement a reorganization of all its related entities. It first authorized the creation of several limited liability companies in New Hampshire three of which are central here, namely LGC HealthTrust LLC, LGC Property-Liability Trust LLC, and LGC's Workers' Compensation Trust LLC.[14] It created first, the two New Hampshire limited liability companies because it planned the merger into each with the two corresponding pooled risk management program entities operated by the Health Trust, Inc. and New Hampshire Municipal Association Property Liability Trust, Inc., both of which were not-for-profit New Hampshire corporations. The LGC, Inc. lawyers were informed by the staff of the attorney general that neither the health trust corporation nor the property liability corporation could be merged with a New Hampshire limited liability company. The staff of the secretary of state likewise informed them that its office would not accept the registration filings to give legal standing to such a merger. The LGC, Inc.'s lawyers then embarked upon another strategy employing the creation of parallel limited liability companies in the state of Delaware into which they sought to merge the New Hampshire not-for profit health trust corporation and the property liability corporation. This strategy failed because of execution mistakes in merging the newly created New Hampshire LLC's with the newly created Delaware LLC's and then merging the two original trust corporations into the Delaware LLC's. This series of mergers was equally improper and was pointed out by the BSR 2011 investigative report as a result of its examination of LGC, Inc activities and eventually

[14]After passage of RSA 5-B in 1987 a fledgling Workers Compensation pool was established by LGC Inc. to be "housed" in NHMA Property-Liability Trust, Inc. Later, on May 31, 2007 the LGC, Inc. placed the then separate LGC Workers' Compensation Trust, LLC within LGC Property-Liability Trust, LLC.

confirmed to LGC, Inc. in 2011. The rather simple result of all of this effort by LGC, Inc. to gain complete control over the Health Trust, Inc. and New Hampshire Municipal Association Property Liability Trust, Inc. failed because as its own witness, Attorney Samuels, testified, “you cannot merge an RSA 292 [non-profit] corporation into an LLC, whether it’s a Delaware LLC or a New Hampshire LLC.” Since the merger failed, each pooled risk management program continued to be legally tethered to their respective New Hampshire corporations not to a Delaware LLC, nor to a New Hampshire LLC.

The failure of the 2003 LGC, Inc. reorganization resulted in severing each of the two viable pooled risk management program’s assets and governance from its legislatively affirmed legal entity. These original corporations, that were synonymous with the health trust and the property liability trust at the time RSA 5-B became effective and continuing until 2003, were left without their assets, without their staff, and without their surplus funds. An argument can be made but was not developed at hearing by the BSR that these, what were to become “ghost” corporations, remained the legal owner of their respective assets.

After 2003 each did not file required annual documents with the office of the secretary of state and each of these corporations was administratively dissolved by the office of the secretary of state on March 1, 2006. No credible argument can be made for purposes of RSA 5-B that either Health Trust, Inc. or New Hampshire Municipal Association Property Liability Trust, Inc. functioned as legal entities between 2006 and 2011[15]. Revival of corporate existence for purposes of RSA 292, the not-for-profit corporation statute, may not *per se* free a legal entity from any distinct obligations, requirements or

[15] On August 31, 2011 the office of the secretary of state issued a certificate of good standing for each of these corporations upon receipt of filings made by LGC, Inc. to revive them. If was not until after the BSR petition initiating these proceedings was filed against the LGC, Inc. and its entities that other documents were executed solely by Maura Carroll directed to “ratify” actions undertaken eight years previously.

standards established under other New Hampshire statutes such as RSA 5-B to maintain its status as a legal entity without interruption or cessation without consequences. See RSA 292:30, IX.

Undeterred, LGC, Inc. and its entities, decided that they were going to operate in a manner that would allow the LGC, Inc. board of directors to have complete control and dominion, by fiat, over what had been separately governed RSA 5-B pooled risk management programs. It would act as though it had reorganized itself properly. Unable to legally merge each corporation with a corresponding limited liability company the LGC, Inc. simply arranged to eliminate the board that had been separately governing each pooled risk management program, transfer the assets of each, and absorb the employees of each into a corresponding limited liability company with which it could not have legally merged.

The single board of directors of an alleged RSA 292 not-for-profit corporation thereafter would be charged with simultaneously fulfilling the varying attendant obligations due to the participating members of the health trust and property liability trust as a qualifying RSA 5-B governing board, with those participants of a separately created workers compensation trust;[16] participating owners of real estate interests; and participating members with legislative or lobbying interests. This "parent/subsidiary" approach employed by the LGC, Inc. and its entities in the world of public entity not-for-profit operation appears, from the weight of the testimony of all witnesses who addressed the topic, unique.

As stated above, unable to legally merge the non-profit corporations into either their respective corresponding New Hampshire or Delaware LLC's, in on or about July 1, 2003 the LGC and its entities

[16] A separate limited liability company made a part of the property liability trust by action of the LGC, Inc. in 2007 to increase its financial balance and improve its position relative to regulatory oversight of the New Hampshire department of labor.

undertook a critical action pertaining to the health and property liability trusts. The LGC, Inc. transferred each of the pooled risk management program's assets from the existing corporations' control to that of the LGC, Inc. board and by-laws simply by "changing the names on accounts and changing the employer ID numbers on the accounts," according to the LGC, Inc.'s own witnesses, Samuels and corroborated by deputy director and chief financial officer, Sandal Keeffe. According to the LGC, Inc. the audited year-end financial statement for 2002 of the total assets of the health trust corporation were reported as $49,189,000.00. The approximate total assets for the property liability trust were reported as $32,706,000.00. The pooled risk management program assets of each, that had received specific attention in RSA 5-B, were separated from their respective governing boards and governing bylaws since they legally remained the assets of the original not-for-profit corporations, Health Trust, Inc. and New Hampshire Municipal Association Property Liability Trust, Inc. Although this transfer or taking occurred on or about July 1, 2003, other than a general resolution authorizing actions that were to be undertaken, no legal documents executed or filed at that time were presented at hearing to demonstrate that the transfers of funds or of any assets were properly, completely and timely done. Eight years later the LGC retained an attorney to address issues raised by the BSR investigative report regarding the status of these two corporations after 2003 and their administrative dissolution in 2006 by the office of the secretary of state for failure to comply with the filing requirements of RSA 292. In addition, it is noted that although the limited liability companies created by LGC, Inc., to operate the RSA 5-B pooled risk management programs filed certain documents with the office of the secretary of state from 2003 through 2011 reporting financial and organizational structure information pertaining to assets, and transactions related to those assets, that office had no authority until 2010 to investigate or initiate

administrative action for any violations of RSA 5-B that may have been revealed by those informational filings.

A specific requirement of RSA 5-B provides that a pooled risk management program be "governed by a board the majority of which is composed of elected or appointed public officials, officers, or employees." RSA 5-B:5, I (b). The BSR advances the position that the reasonable inference to be taken from the statute in its full context is that each of the pooled risk management programs at issue in these proceedings, providing insurance coverage and risk management services to political subdivisions, is required to be governed by a board that is independent of the obligations, interests and duties of another existing board. The respondents advance a position that the statutory requirement in RSA 5-B:5, I (b) only requires governance by "a board" without any further qualification, *e.g.* the BSR term "independent," other than the companion requirement regarding the board's membership composition, the latter of which is not in dispute between the parties. To accurately interpret and apply a statute to a set of facts in an administrative hearing the hearing officer must apply generally accepted rules of construction recognized by our court. The court has concisely expressed several relevant rules of statutory construction that provide guidance in determining how any statute, including RSA 5-B, is to be interpreted. The court stated,

> We first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Moreover, we do not consider words and phrases in isolation, but rather within the context of the statute as a whole. This enables us to better discern the legislature's

> intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme. *The LLK Trust v. Town of Wolfeboro*, 159 N.H. 734, 736 (2010).

The approach of the respondents to isolate upon two words, “a board,” is artificially narrow because it is in the operational context of governance that “a board” takes on any meaning within the statute. It is at this juncture where the respondents veer off from the more reasonable interpretation of the statute’s intended purpose to provide for the creation or affirmation of pooled risk management programs established for the benefit of political subdivisions of the state. See RSA 5-B:1. A fair reading of the full statute orients the governance anticipated by the statute to meet the needs of each pooled risk management program and its member political subdivisions; it does not orient the governance to meet the needs of a controlling third party conglomerate. Testimony by respondents’ witnesses and representations by respondents’ counsel throughout the hearing variously and without distinction to refer to “LGC members,” and “program members,” “multiple insurance lines,” and “insurance programs,” “member pools,” and “LGC pools,” reflect a quite liberal disregard for the legislature’s obvious concern for its new creation, “the pooled risk management program.” The statute’s limited focus is on reducing costs of obtaining insurance coverage by New Hampshire’s political subdivisions and on returning the surplus funds of each pooled risk management program to political subdivisions members for the public benefit. The result of adopting the respondents’ interpretation that a board of directors or a board of trustees or a board that did not have the interests of these specially established pooled risk management programs as their direct, primary, if not sole, interest could provide the governance required by RSA 5-B:5, I (b) or as will be later detailed in this decision, would provide the required governance, ignores the import of the legislature’s purpose in creating this special law.

The respondent's interpretation ignores two important points expressed in the statute. First, the beneficiaries of this statute are intended to be our state's political subdivisions as representative of the public benefit. The beneficiaries of this statute are not intended to be the LGC and its members and its other entities. By abolishing each program's respective board and substituting the LGC, Inc. board of directors, the political subdivision members of each pooled risk management program were deprived of the governance previously maintained for their benefit. There can now be reasonable dispute that such an action dilutes the power of the respective members of each program, the health trust and the property liability trust, to control operation and expenditures. The duty of care that is so crucial to legitimate not-for-profit organizational governance and that was previously exclusive to the trust members, thereafter faced competition with members of other LGC entities in existence and potentially additional LGC entities that may be added to the LGC conglomerate. The duty of loyalty that attends board membership also becomes muddled particularly with respect to "fiduciary duties." The evidence differed as to whether there were two or four duties that qualified as fiduciary duties. The LGC, Inc. adopted a "parent/subsidiary" model where the LGC, Inc. took the position that the legal fiduciary duties of board members flowed "up" to the parent. Nevertheless, the LGC, Inc.'s witness Samuels, whose law practice involves considerable corporate and business entity law, testified that fiduciary duties flowed both up and down in the LGC model. Samuels also acknowledged under cross examination that the LGC, Inc. board would have to determine that a decision they planned to make was, "in the best interest of whatever parties they are governing." LGC witness McCue said all fiduciary duties run up to the parent, noting also however that "under the structure of a single member LLC and in exercising that power [the LGC, Inc. board] has obligations [to the trust members]." Indeed, considering all of the testimony of actual board members that testified, the LGC, Inc. board seems to be continuously "taking off one hat

and putting on another" (Enright); and "deciding what's best for all the members" (Curro), *i.e.* the members of the health trust and members of the property liability trust and the members of the workers compensation trust. Indeed, decisions would have to take into consideration the other conglomerate entities as well: LGC Real Estate, Inc. and the members of NHMA, LLC and the LGC, Inc. parent organization concurrently.

The second point missed in the respondents' interpretation of RSA 5-B:5, I (b) is that since the pooled risk management programs controlled by the LGC were existing corporations with separate governing boards at the time they were specifically affirmed as already existing, not created by the statute in 1987, the legislature is charged with that knowledge. Therefore, the legislature knew of the existing structure of the health trust and the property liability trust programs and affirmed them and the other programs, unrelated to LGC, Inc. (then NHMA, Inc.) in existence at the time of passage as each met the requirements of RSA 5-B:5, I (b) and (e).

It should be noted that in the period of time running up to the decision of merger in 2003, including the time period bracketing the alleged separate votes of the boards of the LGC, Inc. and the health trust and the property liability trust, all three corporations were provided advice and counsel, served or staffed by the same individuals. These individuals were Andrews, executive director; Carroll, general or staff counsel; Keeffe, chief financial officer; Parker, health trust manager**;** Emery, consultant; Reimer, actuary; and more remarkably, Attorney Lloyd, who was retained by LGC, Inc. to provide legal counsel to all three corporations moving towards merger, during the debate and vote of each

corporation, and after the reorganization[17]. These same people all continued to serve the LGC, Inc. conglomerate after 2003. Following the 2003 reorganization an immediate conflict of interest problem arises because of the actions of the LGC, Inc. in eliminating the governing board of each pooled risk management program. By assigning the governance to the LGC, Inc. board of directors the pooled risk management program becomes subject to governing considerations not provided for in the statute. This separate requirement expressed in RSA 5-B:5, I (b) is that each pooled risk management program "shall be: governed by a board." A reasonable interpretation of the statute should support the express purposes of RSA 5-B and those purposes can be fulfilled without resorting to organizational structure that unnecessarily compromises the interests of political subdivision members in one program or another or places those members' funds at risk. A separate board governing a pooled risk management program is free to undertake actions that will serve the purposes of the program over which it governs and its duty is to the members of that program. The actions of the LGC, Inc. to install itself as parent over a subordinate subsidiary takes away the independence of a specially affirmed or created entity to govern itself. The influences and interests that would be limited to considerations of a single program and its members, become subject to other influences and interests within the LGC, Inc. conglomerate related to other subsidiary business entities all governed by the one board. As mentioned earlier these influences and interests include: (1) the operation, maintenance, and control of real estate interests of LGC Real Estate, Inc., placing the board in the position of both landlord and tenant; (2) the operation, maintenance and implementation of legislative advocacy and lobbying efforts, and the information, legal advice, training and general support programs of the NHMA, Inc. placing the board in the position of advocate for the approximately one third of the state's municipalities participating in the workers compensation

[17] It is also noteworthy that these meetings were closed meetings and the minutes were sealed, at least of the health trust, from circulation to its members until some later time that was not evident from the evidence.

trust or the approximately two thirds of the municipalities who do not participate; and (3) the operation, maintenance and financial success of not a single, but three competing pooled risk management programs absorbed as subsidiaries, placing the board in the position of both borrower and lender.

These and other conflicting roles played by a single board are more fully discussed later in this decision in the context of the acts undertaken by the LGC, Inc. board to transfer and expend funds earned by the each separately registered, single-member managed, limited liability company, pooled risk management program. Also the conflicting roles played in the transfers of funds out of the pooled risk management programs and the failure to return excess funds to the different members of each entity are expanded. It is sufficient here to highlight the nature of the interests of the several entities that continually collide within the structure of a single governing board. Such collisions frustrate an reasonable interpretation of the purposes of the statute as expressed in RSA 5- B:1.

Another requirement of the statute at issue in these proceedings is that each program shall be governed by "written by-laws." RSA 5-B:5, I (e). In New Hampshire the term "by-laws" is commonly understood to mean a governing document of a corporation that mandates internal governance and its external dealings. The Health Trust, Inc., New Hampshire Municipal Association Property Liability Trust, Inc., and LGC, Inc. each had filed its own set of by-laws with the office of the secretary of state upon its establishment and since that time as separate entities albeit in the case of the first two entities as separate limited liability companies. Among the LGC, Inc. and its entities' exhibits admitted at hearing, the limited liability company agreements that now exist between each trust and the LGC, Inc. appear not to have been executed until October 20, 2011, after these proceedings were initiated. Maura Carroll, the then executive director of LGC, Inc. signed for both parties to each agreement, without an

accompanying witness signature. Neither of the limited liability companies had the benefit of an "arms length" agreement with the LGC, Inc. and each lacked an operating agreement until eight years after the 2003 reorganization. At the time the LGC, Inc. undertook to transfer assets into limited liability companies it did not create written operating agreements for those companies and did not elect to nor allow those companies to be governed by a board of managing members, but rather chose to operate the limited liability company using a single member option and that single member was the LGC, Inc. This action critically diminishes the authority and control the members of each respective program have over the operation of each program and over the specific pool of earnings and surplus belonging to each program.

The position that the respondents would have the hearing officer adopt does not allow the statute to be read in its full context nor allow the hearing officer to derive a reasonable interpretation from its provisions. It would require an unreasonable interpretation to believe that the legislature had this winding trail of governance transfer and authority dilution in mind when it stated that each pooled risk management program shall be "governed by a board" and "governed by written by-laws" that the legislature saw in place at the time it specially authorized such pooled risk management programs.

Therefore, the hearing officer finds that the LGC, Inc. and its health insurance and, now, combined property liability and workers compensation insurance pooled risk management programs that were affirmed or enabled by the passage of RSA 5-B have not met and presently do not meet the standards related to organizational governance as contemplated and provided by RSA 5-B and therefore these entities have violated RSA 5-B:5, I (b) and (e). The hearing officer also finds that the violation of these two provisions are not dependent on intent. It does not matter whether it was through ignorance,

poor counsel, poor consultant advice or design that the LGC, Inc. and its entities did what they did. It was and is the above actions relating to governance that violated and continue to violate RSA 5-B:5, I (b) and (e).

There may be other consequences of these transactions and asset transfers, but this decision makes no determination, as it should not, regarding the tax consequence, if any, of the events stemming from the attempted transfer of corporate funds, or any tax effect on the pooled risk member's assets, or any effect on the Internal Revenue Code Section 115 governmental exclusion or not-for-profit status of the LGC, Inc. or of its operation of the limited liability companies it has created that may lack non-profit status, all due to and continuing from the conglomerate's reorganization.

Improper expenditure and failure to return

The examination and determinations that follow concern violations of RSA 5-B:5, I (c), relating to the actions undertaken by the LGC Inc. and its entities and the individuals named as the respondents in the operation of the pooled risk management programs. In this section of the decision, the hearing officer uses the terms "health trust," "property liability trust," and "workers' compensation trust," to refer to each LGC, Inc. controlled RSA 5-B entities. Any other intended meaning of these terms will be obvious from the context in which it may appear below.

A key requirement of the statute is stated quite succinctly. RSA 5- B:5, I (c) requires that health trust and the property liability trust, "[r]eturn all earnings and surplus in excess of any amounts required for administration, claims, reserves, and purchase of excess insurance to the participating political

subdivisions." Generally, when called upon to interpret a statute, we interpret the statute not in isolation but in the context of the overall statutory scheme and if the statute has not defined language used within it we look to the plain and ordinary meaning of its words.

The BSR alleges that this particular requirement of RSA 5-B was violated by the LGC because excess returns and surplus were not returned to the respective members of the health trust or the property liability trust. The failure to return funds is alleged to have occurred primarily through actions of the LGC and its entities that resulted from the methods it employed relating to the calculation of reserves and the accumulation of funds from the pooled risk management program members and by the retention of an unreasonable amount of those members' funds. The BSR also alleges that this requirement was violated by actions undertaken by the LGC and its entities relating to the expenditure of funds for purposes other than those required for the statutorily permitted expenditures of each pooled risk management program controlled by the LGC. The BSR also takes issue with the method by which any return to a program's members is made.

The respondents essentially maintain that the statute does not set either a specific numeric expression delineating "excess" nor set a maximum level for earnings and surplus above which the LGC is required to return funds of each pooled risk management program to that program's members. The respondents assert that the board of directors of LGC have the authority, under the governing bylaws of that corporation, to utilize its discretion to set what it determines to be the amount of excess funds required by statute to be returned to the members of each pooled risk management program and to determine the method by which any such amount of funds is to be returned. The respondents further

maintain that the business judgment exercised by the governing board of directors and the management of LGC is sufficient to defeat liability for any violation of the requirements of this statutory provision.

The weight of evidence submitted indicates that each pooled risk program at issue in these proceedings, *i.e.* heath trust, property liability trust, and workers' compensation trust, operates generally like a mutual insurance company with the net assets of each program the property of its respective members. For example, the health trust (1) collects premiums; (2) issues policies; (3) settles and pays claims through a third party administrator; (4) maintains loss prevention programs; (5) has returned earnings; and (6) has purchased reinsurance.

The steps involved in the acquisition of insurance coverage by a political subdivision from, for instance, the health trust would appear quite basic. A political subdivision would apply for membership in a pooled risk management program. Information relating to the group of individuals being insured is submitted for evaluation and rating. Upon approval of the requested insurance coverage for the ensuing coverage year that political subdivision would be assigned a premium rate and assigned to either a January pool of program members or a July pool of program members depending, usually, on that political subdivision's fiscal year or requested coverage year. The premiums of all program members would be collected by LGC, Inc. Any claims would be handled by a contracted third party administrator and in the case of the health trust, the third party administrator is presently Anthem Blue Cross/Blue Shield. From the earnings of each trust program under the statute the LGC is entitled to deduct expenditures, "required for administration, claims, reserves and the purchase of reinsurance." RSA 5-B:5, I (c).

Earnings and surplus of each trust are to be determined annually at the end of the coverage year by subtracting the above expenditures from the total amount of the program's income from investments of that program's contributions plus the combined premiums paid into the program by its members. Because the LGC, Inc. is a not-for-profit entity[18] the term "earnings" and not the term "profits" is used. The following salient lexicon is helpful to the interpretation and application of the RSA 5- B:5, I (c) requirement. "Earnings" means: "1 a: something earned as compensation for labor or the use of capital; b. the balance of revenue for a specific period that remains after deducting related costs and expenses incurred – compare PROFIT." Webster's Third New International Dictionary, p. 714, ©2002, Merriam-Webster, Springfield, Massachusetts. "Surplus" means: "1 a: the amount that remains when use of need is satisfied; b: an excess of receipts over disbursements." *Ibid.* p.2301. "Excess" means "1 a: a state of surpassing or going beyond limits: the fact of being in a measure beyond sufficiency, necessity or duty." *Ibid.* p.792. It is significant to note that the terms "surplus" and "excess" each contains an aspect of need or necessity.

The pooled risk management program being referred to as the "health trust" is by far the largest source of revenue for the LGC, Inc. As of December 31, 2010, the last year for which an audited financial statement was provided at hearing, the health trust had revenues of $392,244,000.00[19]; the property trust had $10,254,000.00; and the workers' compensation trust had $6,517,000.00. The year-end statements for years 2008 through 2010 report that the health trust had net assets of $92,687,000.00 in 2008, $79,481,000.00 in 2009, and $86,782,000 in 2010. The property liability trust had net assets of

[18] Whether the separately filing limited liability companies, as separate entities, are properly designated not-for-profit entities by the LGC, Inc. is not at issue in these proceedings.
[19] For the years 2004-2010 the LGC, Inc. board voted to transfer 1% of the annual gross revenues of health trust to the LGC, Inc. to fund what it referred to as its "strategic plan."

$10,093,000.00 in 2008, $10,838,000.00 in 2009, and $10.225,000 in 2010. The workers' compensation trust had net assets of $829,000.00 in 2008, a negative net asset level expressed as ($992,000.00) in 2009 and net assets of $177,000.00 in 2010.

The statute cannot be reasonably interpreted to have established a limit on the revenues that the health trust receives from its products. The statute cannot be reasonably interpreted to have established a limit on the annual earnings received from premiums paid and a program's investments. However, RSA 5-B:5, I (c) provides that any amount of earnings and surplus retained or maintained by health trust, or any pooled risk management program provided for by the statute, must be returned to the program members in an amount that exceeds the amounts required for "administration, claims, reserves, and purchase of excess insurance." In so stating, this provision establishes an express limit on what the health trust program can retain before it must return funds to its members. It is the amount in "excess." It must be remembered that "excess" means "1 a: a state of surpassing or going beyond limits: the fact of being in a measure beyond sufficiency, necessity or duty." *Id. Webster's*. The LGC, Inc. takes the position that excess is whatever its board decides to declare. It bases its position on the authority it says it acquires under its own governing by-laws and the failure of the statute to specify a particular numeric mandate establishing at what level an excess accrues. However, to adopt that position would lead to a result contrary to the statute's limited purpose and provide an open opportunity for unreasonable conduct by a pooled risk management program or by an entity that has gained control of the enormous revenue generated by such a program as the health trust. To believe that the legislature intended that there be no limit on the amount of earnings and surplus a pooled risk management program, *e.g.* health trust, can deem "required" before returning an excess to the political subdivisions is not a reasonable interpretation of the statute. This is to say that merely because the statute is does not contain a specific

numeral does not mean there is no limit to the amount the LGC entities can properly retain and withhold from the pooled risk management program members. A hearing officer need not add words that the legislature did not use to assign meaning, but certainly can determine, after considering the weight and credibility of the evidence presented over the course of ten evidentiary hearing days, an amount that would satisfy a reasonable interpretation of RSA 5-B:5, I (c). What has been called a golden rule of statutory interpretation provides that, when one of several possible interpretations produces an unreasonable result that is a reason for rejecting that interpretation in favor of another which would produce a reasonable result. 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 45:12 (7th ed. 2007); *In re Malouin*, 155 N.H. 545, 552 (2007); *see also St. Regis Paper Co. v. New Hampshire Water Resources Board*, 26 A.2d 832, 840 (1942); *Dearborn v. Town of Milford,* 120 N.H. 82, 85 (1980).

One way by which a reasonable amount of excess to be maintained for a New Hampshire health trust program could be determined is to look to other statutes within the our jurisdiction. A similar statute governing the pooled risk management program operated by the State of New Hampshire primarily for state employees does set the amount that can be accumulated and retained at a minimum of 5% of estimated annual claims and administrative costs of that health plan plus an actuarially determined amount necessary to fund the unpaid portion of ultimate expected losses, including incurred but not reported claims, and related expenses incurred in the provision of benefits for eligible participants. (See RSA 21-I:30-b). The LGC, Inc. distinguishes this statutory approach as unlike the situation it faces with the operation of its health trust because it asserts that if the state makes an actuarial mistake and the claim losses exceed the claim premiums, the legislature "can just go to the general fund" to make up the difference. The hearing officer does not share the same degree of

distinction the LGC, Inc. and its entities make. Any distinction would appear to be one of degree and not kind. The state has a general fund and each political subdivision has a general fund. Legislative bodies at either level would view such recourse with any greater or lesser degree of ease. The premiums of the health trust are recalculated on an annual basis by which any deficiency, in the event one occurred, could be addressed[20]. Also, the LGC, Inc. allows funds of any of its subsidiary entities to be available to another entity using an inter-company loan policy it has adopted. This would also include the ability to borrow against the equity in its LGC Real Estate Inc. which holds the land and building at Triangle Park in Concord on which there is no mortgage and is carried on its books at a value of $10,000,000.00.

The statute also does not expressly prescribe a particular method of computation to be used by a pooled risk management program to compute the amount of earnings and surplus, that is "in excess of" its permitted RSA 5-B:5, I (c) deductions. Four methods for calculating amounts retained by a pooled risk management program were referenced during the hearing: percentage of claims; percentage of premiums; stochastic modeling; and a "rate based capital" (RBC) ratio. The object of each of the methods is to measure the financial well being of an entity like the LGC trusts. The critical need to maintain viability as a pooled risk management program is to have, at an absolute minimum, sufficient earnings and surplus to cover claims loss and the costs of administration of claims. The BSR's qualified expert (Atkinson) expressed his preference for the stochastic modeling approach to make a determination of the financial well being of the health trust. He characterized it as an approach specifically addressing, in this instance, the health trust and resulting in a more precise figure to

[20] In all years reported at hearing the combined premiums of all health trust members exceeded the cost of claims loss for which the trust was responsible.

determine the "excess" reserves required for the LGC health trust.[21] He contends that stochastic modeling is a more conservative approach than the more one-size fits all dimension or construct of the generic RBC model employed by LGC, Inc.. Applying his methodology, he concluded, after reviewing relevant figures available to him, including the audited financial statements of the LGC and its entities, that the amounts being retained by the health trust were substantially in excess of what was required to meet the permitted costs of RSA 5-B:5, I (c). Mr. Atkinson's testimony is found to be that of a qualified expert regarding the finances related to the operation of insurance programs, including pooled risk management programs, and computation and utilization of an RBC index. The specific amount resulting from his use of a proprietary stochastic formula not shared with the respondents and therefore not subject to proper cross-examination, lacks sufficient weight that it might otherwise be assigned for the specific mathematical conclusion that a reasonable ratio for the LGC, Inc health trust would be RBC 2.1. That he is qualified to analyze or compute an RBC ratio is not questioned. That he is qualified to examine the financial information provided by the LGC, Inc. and ascertain amounts of net assets and other categories of assets and liabilities is not questioned. He is qualified to render an opinion as to the amount of net assets held by the LGC, Inc. controlled health trust.

He allowed that the other methods of calculation are used or have been used in the insurance industry and that the RBC ratio is recognized by and used by all state insurance commissions in their regulatory assessments of the financial strength of entities under their oversight authority.[22] The RBC ratio represents a level of capital that regulators have determined an insurance entity should hold, based

[21] While the health trust program also offers a dental plan, little evidence was presented by either the BSR or the respondents that indicated that such revenues and costs of that particular line of insurance would substantially affect the issues considered in this decision.

[22] Mr. Atkinson's uncontroverted testimony regarding the recognition of RBC indicated that the State of New York was at some variance from the nationally recognized RBC index.

upon a formulaic assessment of risks, to protect its members from adverse developments before regulatory action will be taken. The RBC ratio is a number that relates to the amount of authorized control level (ACL), *e. g.* RBC 2.0 is equal to twice, or 200% of the amount of authorized control level (ACL) which is expressed as RBC 1.0 or the equivalent of 100%; RBC 3.0 is equal to 300% of funds necessary to meet hypothetical amount of capital or surplus an insurance company needs.

The LGC, Inc. asserts that since 2003 it has utilized the RBC to set a desired "target" against which it would measure the sufficiency of its net assets. For the year 2010, this was reported as RBC 4.3 or 430% of the LGC health trust's predicted actual claims loss. (See Table 1, below, for reported actual RBC figure for years provided immediately preceding 2010). The significance of expressing net assets as an RBC ratio can best be understood by remembering that it is merely a regulatory index for use in the insurance industry developed by the National Association of Insurance Commissioners. The LGC, Inc.'s switch to the use of an actuarially based RBC ratio, for whatever reason, as will be detailed later in this decision, was flawed due to its actuarial accuracy being arbitrarily adjusted by the LGC, Inc. board. In rendering this decision the hearing officer considered how the witnesses were using the term as a ratio related to the authorized control level (ACL) figure.

The RBC index numbers have significance only in relation to the actions a regulating authority may undertake. A regulatory intervention would usually occur when an RBC fell below 0.7; between 0.7 and 1.0 a regulator generally has the option to intervene with the entity; and between 1.0 and 2.0 the entity may be required to start filing reports with a regulating authority to reveal how it is managing its program's capitalization and how it plans to strengthen its capital, or net asset position.

In 1997 the New Hampshire Insurance Commission contacted the then, NHMA, Inc. (now LGC, Inc.) and NHMA Health Trust Inc., although lacking specific legislatively assigned authority, to inquire as to its financial well being in light of allegations of insufficient loss reserves that had been made in litigation unrelated to this instant matter. The commission was assured by the then, NHMA, Inc. and NHMA Health Trust Inc. that the health trust was financially sound. At the time these assurances were made the net asset level of the health trust stood at a level equivalent to RBC 1.22. After being assured of its financial strength by management, the insurance commission withdrew from further involvement. To underscore its financial soundness at the RBC 1.22 level, at that time the chief financial officer, Sandal Keeffe, explained in a memorandum to the health trust members that the line item "member balance" alone was not the sole nor the best measure of the health trust program's financial strength. Her memo read, "The member balance represents the funds remaining after it has set aside reserves, to pay claims and related costs of operations…The trust believes it has priced its products to remain fully funded and financially sound." The rationale for soundness at that time therefore took into consideration, members' balance, claims reserves and administrative costs. The reductions in the RBC ratio from the prior year's RBC 1.85 ratio had resulted from the introduction of a new insurance product by the health trust that was more costly than expected coupled with a previous decision of the then separate board of trustees of the health trust voting to return some of the amount retained as a capital reserve with the RBC standing at 3.89, *i.e.* excess, to the contributing members of the health trust.

That explanation of the significance of the line item "members balance," presently labeled "board designated," is important as it confirms that then, as now, reference to the LGC health trust's financial statements indicates that the RSA 5-B referenced costs associated with claims loss and cost of administration are sufficiently held and identified in line items other than what has, since the 2003

reorganization, been an amount appearing in “board designated” or “undesignated,” or both, as used by LGC, Inc. from time to time. It is further revealed by an examination of the health trust’s annual financial statements for years 2003-2009 that an additional amount of health trust funds were set aside in still another line item linked to another RSA 5-B permitted cost, that of the cost for the “purchase of reinsurance.”[23]

That equivalent[24] of RBC 1.22 is the lowest the health trust has experienced since 1997. By 2002, the RBC equivalent ratio for the net assets being held by the LGC stood at RBC 2.8, or 280% of its actual claims loss at that time. For other years since the 2003 LGC reorganization that changed the structure and the operation of the health trust, the equivalent RBC ratio was as follows:

Table 1.

YEAR	NET ASSETS (as % of claims)	RBC	
1994	30.2	5.08	
1995	23.4	3.89	
1996	10.8	1.85	
1997	7.6	1.22	
1998	14.2	*	
1999	19.3	*	*not converted to RBC equivalent by any party
2000	15.4	*	
2001	16.0	*	
2002	14.2	2.8	
2003		2.6	(first year of reorganized LGC and entities)
2004		3.6	
2005		4.5	
2006		6.0	
2007		6.7	(first rate reduction for health trust members by “parent”)
2008		6.4	(rate reduction suspended after one year of planned 3 years)

[23] The LGC board voted to abandon it past practice of purchasing reinsurance for 2010 and instead assumed the full responsibility for all amounts of claims regardless of amount, thereby eliminating protection from unusually high or catastrophic losses.

[24] In 1997 the LGC, Inc. (formerly NHMA, Inc.) did not use the RBC method, it used the percentage of claims method.

2009	4.8 (first year after financial information filings required)
2010	4.3(first year after amendment to authorize investigations)

The above list reveals the rapid rate at which the health trust accumulated earnings from their members' premiums and investment income over the span of years portrayed. It reveals what is reported as a substantial drop immediately preceding the statutory assignment of reporting and investigation authority responsibility within the office of the secretary of state. It also reveals that when it reached its lowest amount of net assets expressed as a percentage of claims (1997) it was able to essentially double that figure within one year.

A corresponding list showing, in dollar amounts, the funds reported by LGC, Inc. for the health trust represented by the above RBC ratio and the precipitous depletions of additional funds set aside in the line item "undesignated[25]" significantly after the 2009 and 2010 amendments to RSA 5-B appears below:

Table 2

YEAR	BOARD DESIGNATED	UNDESIGNATED	TOTAL NET ASSETS
2003	N/A	$23,944,000.00	$24,965,000.00
2004	N/A	$24,873,000.00	$39,920,000.00
2005	N/A	$56,303,000.00	$56,302,000.00
2006	$60,766.000.00	$16,248,000.00	$77,234,000.00
2007	$64,528,000.00	$25,047,000.00	$91,529,000.00
2008	$68,311,000.00	$25,723,000.00	$92,687,000.00
2009	$77,885,000.00	$ (757,000.00)	$79,481,000.00
2010	$84,412,000.00	$ (974,000.00)	$86,782,000.00

[25] The Executive Director from 1976 to 2009, John Andrews, testified that he considered the funds appearing in the "undesignated" line as "free excess."

It is notable that over a similar, 2004-2010, span, the LGC, Inc. as a stand-alone entity reveals operating losses in the approximate amount of $7.5 million.

The respondents place undue significance on information appearing in reports regarding the RBC ratio numbers that have been attributed to insurance companies in other states. RSA 5-B explains that the purpose, in part, of the statute is to establish these pooled risk management programs and lower insurance costs by predicating them, "solely on the actual experience of political subdivisions within the state." RSA 5-B:1. Therefore, special attention must be paid to the surplus retained by the health trust or other LGC programs operating here in New Hampshire. These reports were undertaken for purposes other than this instant matter, and lack supportive evidence that any of the jurisdictions, in the case of the Pennsylvania report, or the combined list of profit and non-profit insurance-like entities operating in Massachusetts, are subject to a statute like ours that mandates a return of funds to political subdivisions in excess of the costs of administration, claims, reserves and purchase of reinsurance. References to the RBC ratio included for each of the jurisdictional entities included in the Pennsylvania report or the mixed profit/non-profit entities in the Massachusetts report further decrease the weight of these studies as evidence. This is so because of the minimal comparative value between so-called "targeted" RBC ratio interspersed in these reports and the "actual" RBC ratio that bears a closer relationship to the level for a return of earnings of the health trust required by our statute. The non-existence in these other jurisdictions of a statute similar to RSA 5-B in its design and intent to restrict retained earnings diminishes the evidentiary weight of these reports. Also the statutory distinction comparing the cost of a pooled risk management health program based solely upon a New Hampshire political subdivision's group of individuals, census, population, "live bodies," or as colorfully referenced at hearing, "belly buttons," to a dissimilar collection of "belly buttons" in other states like Pennsylvania, Massachusetts,

Michigan[26], and the like has little evidentiary value. The reason for this being that the risk inputs used to calculate the RBC ratio of these other states' populations or groups is different as indicated by the testimony of LGC, Inc. actuary, Peter Riemer**.** While reference to other entity's within an industry may be considered in determining a reasonable level of retention because of the distinguishing categorical differences between these jurisdictions and entities, which are cited by the LGC, Inc. and its entities, and the pooled risk management programs here in New Hampshire and at issue in these proceedings, they essentially eliminate their consideration for such purpose.

Reference to the figures appearing in the above tables show that since the 2003 year-end, following the reorganization into the so-called LGC "parent/subsidiary" model, the amount previously labeled in the health trust financial statements as "members balance," then "undesignated," and finally, "board designated," increased by approximately 350% by 2010. In addition, funds were also transferred to the line item "undesignated" from 2006 forward amounting to an additional $25,723,000.00 before depletive transfers were made to this long standing line account. This account was essentially depleted by LGC, Inc. by electing to use this account line item to fund what it reported as additional claims losses in the approximate amount of $8.8 million; transferring approximately $4.4 million to the LGC, Inc. itself. These transfers, occurring in 2009, are also coincident with the requirement for financial filings with the secretary of state becoming effective pursuant to the 2009 amendment to RSA 5-B. These undesignated funds were referred to as "free excess" by the former executive director, who coincidentally also moved his retirement up to September 2009.

[26] The report states that Michigan has a maximum RBC rate of 10.0 that an insurance company can retain. This RBC 10.0 ratio is an extreme level never having been reached by the plan.

In the next year, breaking pattern, no funds were assigned by the LGC, Inc. into the previously funded "undesignated" account. Reference to Table 2, above, reveals a significant boost to the board designated account however. Earlier in that same year the additional investigative authority was assigned to the secretary of state pursuant to the 2010 amendment to RSA 5-B. The credible and qualified testimony of BSR witness Atkinson permits the finding that the essential elimination of the funds that ordinarily would have been assigned to this account was accomplished by an inexplicable increase within that year's calculation of risk factors by the LGC, Inc. actuary or staff. Contrary testimony to the extent that there is any, lacked such credibility. Viewed in context, even allowing for some amount claimed by LGC, Inc. to have been used for a partial "rate stabilization" of health trust premiums, the sudden diminishment of approximately $25 million in "undesignated" or "free excess" account funds to address transfers or expenditures rings hollow. But the many years during which that account was funded gives some indication of funds that were in excess even beyond the substantial funds the LGC, Inc. board assigned to the health trust "board designated" asset account. Again, it should be kept in mind that the amounts held even in this board designated account were beyond those funds necessary to satisfy claims loss, including those incurred but not reported, and the administration of those claims which were assigned to other line item accounts.

By December 31, 2010 the LGC, Inc. had accumulated and was retaining $86,782,000.00 as net assets or over 430% (RBC 4.3) of its actual claims loss. These net assets derive from the earnings of the health trust and surplus allowed to accumulate from the premiums paid by the member political subdivisions and investment income. These remaining net assets when added to the substantial amount of funds transferred out of the health trust to LGC, Inc. represent an amount of earnings and surplus that may reflect a very successful "for-profit" business, free in this instance of regulation by the insurance

commission and exempted from paying any tax. This amount of retention does not reflect the proper operation of a statutorily authorized special pooled risk management program whose purpose, in part, is to return excess earnings and surplus to the members of the health trust as required by RSA 5-B:5, I (c).

The key to understanding how the LGC and its entities violated the provisions of RSA 5-B:5, I (c) lies in certain actions or practices of the LGC that caused an unnecessary and unreasonable diminishment in the amount of funds in the health and property liability pooled risk management programs that should otherwise have been considered excess and returned to members of each of these trusts. These LGC actions or practices fall into two broad categories: (1) improperly expending and transferring funds from the health trust and to a lesser extent from the property liability program; and then, (2) retaining an unreasonably large amount of earnings and surplus within the LGC and its entities thereby withholding it from return to political subdivision members.

One of the several actions undertaken by the LGC management and board that diminished the earnings of each program otherwise available for return to members was to take $500,000.00 from the health trust and $500,000.00 from the property liability trust in 2000 to fund a separate workers' compensation trust. These amounts were transferred from the health and property liability program accounts by the LGC, Inc. (at the time, NHMA, Inc.) and constituted excess funds that the statute contemplated were to be returned. They qualified for return because the statute cannot reasonably be interpreted to allow such a transfer of funds to fall within any one of the statute's four allowable deductions, *i.e.* administration, claims, reserves or the purchase of reinsurance. RSA 5-B:5, I (c). In addition, those transfers from each program was made without contemporaneous consideration given to

each existing program and without express permission of each political subdivision member of the health or property liability programs to which the funds "belonged."

Another action taken by the LGC and its entities that diminished the excess earnings and surplus of the health trust and property liability trust programs was, and is, the continuous practice of taking funds from the health and property liability programs to subsidize the operation of a workers compensation pooled risk management program that was financially deficient, *i.e.* insufficient premiums were paid to cover all claims and administration of claims costs. The extent of the deficiency of this program became less obvious to casual financial review when, in 2007, it was merged with the property liability trust which allowed it to exceed financial minimum levels required by the department of labor. This workers' compensation program also was comprised of a different set of political subdivision members. These periodic transfers out of the health and property liability accounts to subsidize another program were done in violation of a specific inter-entity loan policy that existed to govern transfers within the LGC and its entities and without compensation to the health trust and the property liability trust[27]. Further, the LGC, Inc.'s manner of reporting these transfers as "contributions to parent" on the financial statements of the health trust and property liability trust made it unnecessarily difficult, as did other referencing, *e.g.* strategic contribution, for a member reviewing the financial statement to discern the actual purpose of the transfer as a subsidy, in whole or in part, for a separate pooled risk management program to which that member did not subscribe. Table 3, below, displays the amounts for

[27] After an investigatory report on these actions by the BSR, the LGC board voted to execute a promissory note payable to the health trust in an amount of $17,111,804.35 million. However, it did so making the note interest-free despite the recommendation of its new executive director that it be interest bearing and without a fixed temporal duration for the note. The provisions of this note violate the express policies of the LGC and its entities regarding inter-entity loans.

the years indicated that the LGC, Inc. transferred funds out of the respective pooled risk management programs as named.

TABLE 3

YEAR	Contribution by Health Trust to LGC, Inc. (parent)	Contribution by Prop. Liability to LGC, Inc. (parent)
2003	$ 3,930,000.00	$ 1,398,000.00
2004	$ 1,013,000.00	$ 34,000.00
2005	$ 2,675,000.00	$ 438,000.00
2006	$4,181,000.00	$ 160,000.00
2007	$4,501,000.00	$ 20,000.00
2008	$6,545,000.00	$ 758,000.00
2009	$4,431,000.00	$ 179,000.00
2010	$3,875,000.00	$ 150,000.00

It is from these contributions to the parent, that LGC, Inc., chose to subsidize its workers compensation program. The exact amount of these funds directed to subsidize the workers' compensation program from the health trust through December 31, 2010 are difficult to ferret out from the state of the financial statements entered into evidence. A qualified BSR witness, Coutu, testified at hearing that the subsidy from the health trust amounted to approximately $18.3 million.[28] These represent funds that, if not transferred as improper subsidy payments, could have been returned to the members of the health trust and members of the property liability program, in whole or in part, during the years in which they were transferred, or can be returned presently as excess earnings and surplus.

A third action undertaken by the LGC and its entities relates to the transfer of ownership of certain real estate in 2003 from the health trust, having a 75% interest, and the property liability trust,

[28] The workers compensation program was merged with the property liability program in 2007 and any prior subsidy contributed by the members of the property liability trust to the workers' compensation program are deemed to currently remain as surplus within the combined program.

having a 25% interest, to another LGC entity, namely LGC Real Estate Inc. without any compensation to the two trust programs. The value of the real estate at the time was approximately $5,000,000.00**.** This was not a purchase of this real estate from the two programs, but a transfer or conveyance without compensation paid to the two programs that also represents a diminishment of earnings that could have been available for return to program members and a benefit to the LGC, Inc. and its other entities. Although not stated as its present fair market value this real estate is presently carried "on the books" at a value of approximately $10,000,000.00 by LGC. Adding to the adverse financial effect of transferring the real estate ownership away from the health trust and property liability trust programs is that the LGC, Inc. management and board requires each program to pay rent to LGC Real Estate Inc. that inures to the economic benefit of LGC, Inc. and its other entities. Further, while the LGC argues that its other entities also pay rent at the same rate proportionate to the space that each occupies, those other entities did not have any ownership interest in the real estate before the transfer to LGC Real Estate Inc. In addition to losing title to the real estate, the LGC and its entities thereafter transferred approximately $3,000,000.00 from the health trust for improvements to the real estate, again from funds that otherwise could have been returned to its political subdivision members, in whole or in part and could presently be returned.

There is a last insult in this string of actions undertaken by LGC, Inc. and its entities that diminished the earnings and surplus that otherwise could have been returned in whole or in part to the health program and property liability program members. The LGC, Inc. entered into agreements with two unrelated entities that requires LGC, Inc. and its entities to provide free office space. With one of these unrelated entities, the New Hampshire School Boards Association (NHSBA), the LGC, Inc. committed itself to an additional annual service payment to the NHSBA in the amount of $68,000.00;

plus $10,000.00 annually for sponsorship of the school board association's website; plus $5,000.00 annually to support publication of a handbook for the school board; plus up to $40,000.00 annually to support the salary of a school board association staff attorney position; plus up to $10,000.00 annually to fund a new staff position for the school boards association. This last contribution was to obtain the provision of "coverage" or short term assistance at various times, *e.g.* during lunch breaks of during meeting attendance, for LGC, Inc. and its employees. This agreement with the New Hampshire School Boards Association is to last for approximately ten years through 2014. While the LGC can point to receipt of some shared receptionist-type services as part of that agreement, such services as described are reciprocal as the LGC provides similar services to that association and represent minimal, if any, financial compensation to the pooled risk management programs from which the real estate was transferred. The other entity, Municipal Bond Bank, is provided rent-free occupancy while the health trust and property liability trust are required to pay rent to a "landlord" who previously acquired the property from them without paying compensation.

There are also several other actions that have been undertaken by the LGC, Inc. and its entities that required, and to an extent continue to require, the LGC, Inc. and its entities to expend money that diminishes earnings and surplus that could in whole or in part be returned to the members of the health trust and the property liability trust. These actions do not amount to such large fund depletions from the health program and property liability programs as those actions described above. But they do reveal the financial magnanimity that appears to have enveloped the LGC, Inc. after the 2003 reorganization that gave the LGC, Inc. board and management direct authority over all health trust and property liability trust revenue, earnings and surplus. Soon after the reorganization of the LGC, Inc. and its entities and the continuing practice of improper fund transfers and expenditures, the LGC, Inc. board established and

contributed a fixed benefit retirement program for its employees at a specific cost that could not be determined from the evidence. LGC, Inc. also approved a consulting agreement for its former executive director upon his retirement in the amount of $100,000.00, in annual increments of $20,000.00. The LGC. Inc. and its entities adopt the position that this was an "arms length" agreement with fair consideration provided by each party. However, notwithstanding that it was allegedly executed for the provision of consulting services, no such services were provided by this former executive director. The LGC, Inc. and its entities' adopt a supplemental position that the payment to him was also in exchange for a non-competition agreement preventing him from providing essentially the same services to others that he did for LGC, Inc. and its entities. His testimony did not represent that his retirement was due to the enforcement amendments added to RSA 5-B, but that it was actually moved up from its later planned date because of health reasons, from which it can reasonably be inferred would inhibit, in whole or in part, his continued performance of consulting in the sophisticated and stressful areas of activity described in a non-competition clause of his agreement. His adverse health reasoning for retirement at that time stretches the credulity of this LGC, Inc. argument.

Each of the actions described above and the related transfers and expenditures of funds constitute violations of RSA 5-B:5, I (c) by improperly removing funds from the two pooled risk membership programs that represent earnings and surplus that are required to be returned as excess to the political subdivision members of each program because these amounts do not reasonably qualify as costs and reserves permitted to be retained by the statute.

Two basic points deserve reiteration before discussing a second set of practices employed by the LGC, Inc. that results in the LGC, Inc. and its entities withholding excessive funds instead of returning

them as excess to health trust members. First, the statute's formula for returns is straightforward, *i.e.* Earnings + Surplus – (costs of administration + costs of claims + reserves + cost of reinsurance) = Amount returned to member political subdivisions. RSA 5-B:5, I (c). And second, the LGC, Inc. is a not-for-profit organization that controls the health trust, a pooled risk management program, specifically created by the statute to provide certain insurance coverage for New Hampshire's political subdivisions at a lower cost and with anticipation of returns to the members for the public benefit.

The LGC, Inc. and its entities take an obvious position that the more capital, or net assets, an entity has the better for that entity. However, the purpose of the statute is not to allow LGC, Inc. and its entities to acquire and retain unlimited millions of dollars in excessive earnings and surplus, building equity as a private for-profit corporation might. The LGC, Inc. by-laws were amended to provide that "upon dissolution [of the health trust, property liability trust] the assets of each trust would be distributed to its members." However, the statute cannot be reasonably interpreted to have intended such a distribution to solely satisfy the return of excess required in RSA 5-B:5, I (c). Further, dissolution may never occur. If it were to occur at some unspecified future date it would be difficult, if not impossible, to assure member political subdivisions that they would be fully and proportionately provided the accurate shares of those funds. The LGC, Inc. has admitted a policy of not retaining records of its financial operation in perpetuity and of computer record failure that has resulted in lost relevant financial data. Also, there are innumerable ways by which such retained earnings and surplus could become encumbered or, given LGC, Inc. history of expenditures or transfers of contributions out of the health and property liability pooled risk management programs, simply spent or "loaned" without interest for other purposes.

The LGC, Inc. and its entities made decisions following the reorganization that resulted in it acquiring approximately $1.1 billion dollars from the premiums paid by the health trust members from its parent/subsidy reorganization in 2003 through 2010. It returned only 2.7% or $30.2 million of that amount to the members as excess during that same period while it increased its own net assets from $24.9 million to $86.8 million. This juxtaposition of LGC, Inc. organizational benefit for the little benefit to political subdivisions, that are supposed to be the statutory beneficiaries of the success of the RSA 5-B programs, is a result that is indicative and reflective of the LGC, Inc. substituting its own desires for the statutory needs provided for by RSA 5-B:5, I (c). Reference again to Table 1 shows the ironic growth in earnings and surplus retained by the LGC, Inc. and management during a period when members were able to hold funds in their own accounts to provide a “buffer” or “cushion” for the ill financial winds that have and continue to buffet them in the past decade.

There are two factors contained in the statutory formula for returns that do not merit much discussion. These are two of the costs within the above formula for which the LGC, Inc. controlled trusts are permitted to retain funds before making returns to the program members: (1) the cost of claims; and, (2) the administrative costs associated with the processing of those claims. The BSR did not offer any evidence showing that the amounts paid for actual claims by the health trust were excessive or improper so there is no finding that the statutorily permitted deduction for claims was violated. Also, there was insufficient evidence submitted to establish that the costs of the administering claims of the pooled risk management program were excessive or improper. The BSR expert witness, Atkinson, conceded that the LGC, Inc. reporting of the cost of administration at 7.7% of claims was reasonable. There may be issues that remain relating to how the LGC, Inc. may have expended pooled risk funds for administrative costs not required for the specific operation of the pooled risk management programs, *e.g.* alleged costs for

unnecessary litigation and lobbying expenses, but these were not developed at hearing. Therefore no further discussion in this decision is attributed to such other administrative costs or the extent such were necessary to the operation of the pooled risk management program entities, particularly the health trust.

On the other hand, the costs of purchasing reinsurance and setting the retention level of reserves do require more attention. The manner by which the LGC, Inc.-controlled health trust addressed the issue of reinsurance is an example of its operative disregard of the purpose and standards of RSA 5-B. Over time the LGC, Inc. built up its net assets to such a high level that in 2010 it abandoned the practice of purchasing either individual claim or aggregate reinsurance to cover an extraordinarily large individual claim loss or a extraordinarily large combined number of individual claims, that otherwise and reasonably were anticipated by the statute to require pooled risk management programs to purchase reinsurance. Reinsurance to "cap" the amount that will be paid out on a single individual's claim is a common practice whereby an insurance program will cede to the reinsurer the risk that any individual claim will exceed the cost cap limit set. Another type of reinsurance also purchased by the health trust provided reinsurance for an aggregate claim loss for a coverage period. This occurs when the combined claims loss for all insured "belly-buttons" exceeds a previously fixed aggregate amount during a coverage term. In both instances, the reinsurance provider steps in and assumes the risk that excessive or "catastrophic" losses may happen and pays the claims cost in excess of the agreed cap. This common practice in the insurance industry relieves the primary insurer of having to include such extraordinary calculations in annually setting its risk loss and, in the case of the LGC, Inc. health trust, having to maintain an unreasonably high level of net assets. When the LGC, Inc.-controlled health trust made the decision not to purchase reinsurance it indicated that it was then holding sufficient net assets to take on

the sole and complete responsibility for meeting catastrophes that would result in extraordinarily large claims loss.

For what catastrophes was the LGC, Inc. aiming to increase net assets by retaining members' excess earnings and surplus to cover in the event of their occurrence? The chairman of the LGC, Inc. board of directors provided testimony revealing the level of catastrophes for which he believed the LGC, Inc. health trust had to be prepared. These included catastrophic claims loss ranging from a World War I type pandemic, where 700,000 people died in this country, to a Seabrook Nuclear Power Plant failure. These ruminations lead him to conclude, "I think I'm supposed to think about these things. I think I'm supposed to see that there's a reserve level that will—that will handle whatever comes our way." He proceeded to add, that in view of the recent enormous nuclear disaster in Japan, "… I think I have to consider – not that I think the world's going to fall apart, but it's important that I look out on a distant horizon when we're talking about reserves." The LGC, Inc. actuary's testimony added "terrorist attack" to the panoply of risks the health trust believes it must retain additional members' earnings and surplus rather than pay a fixed premium for reinsurance as anticipated by the statute.

The LGC, Inc. health trust's justification for the decision to abandon reinsurance was that the reinsurance premium constituted an amount of money "going out of the system." Few of us like to pay insurance on our own homes either, but seldom do we assume the risk not to do so. Fewer more would reasonably undertake the option of setting aside enough money to replace our home in the event of a catastrophe; much less do so in the face of the competing needs of our family members. This testimony regarding the size of the events for which it is now prepared evidences the desire and practice of LGC, Inc. and its entities to retain a substantially higher level of reserves than otherwise would be necessary

with reinsurance in place. Again, its limitless approach to the use of reserves puts the LGC, Inc. entities' interests before the health trust members' interest and supports strongly why the purchase of reinsurance was specifically provided for in the statute. The only reasonable interpretation of RSA 5-B:5, I (c) in addressing the operation of the not-for profit entities is that the financial safety provided by reinsurance for the health trust or property liability trust, despite an annual premium cost for that reinsurance, was contemplated to protect the political subdivision members and enhance the potential return to them of surplus. Substituting the higher retention of earnings and surplus to build sufficient reserves to handle "whatever comes our way," instead of the purchase of reinsurance clearly inflates a reasonable and necessary level of reserves or net assets and is a violation of RSA 5-B:5, I (c). No longer needing to maintain such a high level of assets to self-insure against such catastrophic or excess claims also assists in determining a reasonable net asset reserve that more appropriately would be necessary to the operation of the health trust and to determine the amount of net assets that could presently be returned to health trust members.

The remaining issue for examination under the provisions of RSA 5-B:5, I (c) are the practices employed by the LGC, Inc. and its entities in setting a reasonable level of reserves. A reserve is, "money or its equivalent kept in hand or set apart usually to meet a specified liability or anticipated liabilities: as b(1) the portion of an insurance company's assets set aside for some special purpose as evidenced by showing the reserve as a liability on the books." *Ibid. Websters,* p. 1930. It has been cited previously in this decision that the statute does not express a specific numeric, percentage, or ratio, to the level of reserves that qualifies as a permissible deduction. This alone does not make the statute silent, nor abdicate the state's responsibility, and in this matter, its statutory authority to require pooled risk management programs to operate under a reasonable interpretation of RSA 5-B read as a whole. The

LGC, Inc. controlled health trust maintains reserves to cover its anticipated or predicted medical claim losses. As to the amount of funds set aside for these purposes the only issue in conflict appears to involve a difference of opinion between the BSR expert, Atkinson, and the LGC actuary, Reimer, regarding the amount reserved to cover claims that are incurred but not reported (IBNR). The BSR asserts that the LGC, Inc. health trust reserves approximately 10% more than is appropriate for IBNR. However, this difference was not sufficiently developed at hearing and therefore is not part of these findings.

Other funds reserved appear in LGC, Inc. financial statements through the years as first, "members balance," then "unrestricted," and then "board designated." In 2006 the LGC, Inc. health trust began holding funds not in either unrestricted or board designated accounts, but in both as the amount of its net assets increased. Its witnesses testified that LGC, Inc felt it needed more of a "cushion" in case there were unforeseen risks that exceeded the planned claims loss. At the same time that the LGC, Inc. was maintaining this position, its health trust was growing in size and through a theory of probability known to its actuary and the LGC, Inc. staff as the "Law of Large Numbers;" the predictability of loss risk actually decreases with an increase in the number of individuals under coverage. The example provided was a coin toss. The more times you flip a coin, the more likely the ratio of heads to tails will narrow towards a 1:1 ratio.

By 2008, the year prior to the requirement that it make additional filings with the office of the secretary of state, the health trust financial statement reveals a claims loss reserve of $22,896,000.00, and an additional amount reserved as "board designated" funds of $68,311,000.00, and still an additional amount reserved as "undesignated" funds of $25,723,000.00. This last account was that amount

considered "free excess" by the former executive director. The former executive director does not appear far off the mark. That characterization has support in the management discussion and analysis accompanying the December 31, 2006 financial statement. There it indicates that the amount of funds that "met" its own "target" RBC of 4.2 were assigned to a "designated" account, thus leaving this admitted amount in excess of its own reserve target to stand in the undesignated account. It is determined, then, that even when the LGC, Inc. controlled health trust exceeded its own chosen target for net assets, it did not return the excess to the political subdivision members. It improperly retained these funds, truly as its own excess; funds it seems, as in the past, in search of a use.

Another action undertaken by LGC, Inc. that results in it retaining an unreasonably large amount of net assets or excess is its decision to arbitrarily bump its own target RBC 4.2 ratio by an additional factor of approximately RBC 0.5 for future expenses. This adjustment amounted to $7,100,000.00 in 2006. These administrative expenditures involved contemplated building expansion and improvements, technology system improvements, and other unnamed administrative expenditures. The RBC ratio is supposed to be the result of a risk based analytical formula. An after-the-fact bump of an arbitrary sum the board referred to as RBC 0.5 is an erroneous use of an RBC ratio and is an improper inflation of even its own target RBC 4.2. to cover what in most entities are planned budgeted expenditures. A fair reading of the accompanying financial statement management discussion and the explanation rendered by the chief financial officer at hearing simply points out that at that time the LGC, Inc. health trust had funds available for return to political subdivision members but found another use for them. This other use chosen by the LGC, Inc. board is but another example of the members' interests being subordinated to the LGC, Inc. board. To borrow a term from the argument of the LGC, Inc. and its entities, after filling all of its "buckets": claims reserve, board designated account, and the additional undesignated

account, the LGC, Inc. and its entities had an obvious overflow. Yet, its thirst was such that it was going to hold on to the additional $7.1 million. It was going to retain it because from the chief financial officer's testimony it appears they were going to do something with the money without knowing specifically what amount they were going to spend, or when they were going to specifically spend it. But they were going to use the board's annual rating process discussion and what is supposed to be a relatively exacting risk loss calculation to retain another arbitrary, and non-risk based $7.1 million. The insult to the health trust program members here is that they very well could have used funds to improve any of their own buildings or improved their own technology systems or set it aside in their own respective lapsed fund accounts, as some eventually indicated that they did want funds returned.[29]

These funds were not fully expensed out for approximately three years, which coincides with the reporting year of 2009, the same year in which financial reporting accountability was imposed on the pooled risk management programs by amendment to RSA 5-B. With the amount of net assets already having been accumulated and continuing to accumulate the retention of an additional RBC 0.5 factor for the above purpose requires an unreasonable interpretation of RSA 5-B generally, and RSA 5-B:5, I (c) specifically, and therefore violates the statute.

Another practice followed by the LGC, Inc. and its entities that indicates that it has retained earnings and surplus in excess of the four permitted deductions of administrative costs, claims, reserves and purchase of reinsurance involves the nature of its investments. While acknowledging that the LGC, Inc. health trust has adopted an investment policy, the policy permits an investment strategy that is at odds with the purposes of a return of excess to political subdivision members. Health insurance is

[29] Prior to the hearing several political subdivision members of the health trust made specific requests for a return of funds related to transfers of funds out of the health trust, through the LGC, and into a separate entity to subsidize a deficient workers' compensation program, *e.g.* Dover, Portsmouth.

referred to as an insurance coverage that has a short tail because you know within a relatively short period of time after the claim what it's cost will be. The petitioner and respondents agree to this "short tail" characterization while they differ slightly in stating just how long is a short tail. I find that a period of three years following a claim would constitute a sufficient period to accommodate a short tail coverage, based upon the testimony of Coutu and Emery, and in an affidavit provided by Emery in another proceeding but provided as an exhibit here.

When one looks at the investment holdings of the LGC, Inc. health trust, a not-for-profit entity with the purpose of providing lower cost health insurance and with the purpose also of returning earnings and surplus to its members, one would expect that the investments would somewhat mirror the three-year short tail period. It is during these three years following a claim, that almost all claims that are made tail off, and those few remaining will carry costs that are predictable. To have funds invested beyond the three year period would be funds that, if needed, could not be obtained without the so-called "breakage cost" of prematurely terminating a planned investment return, that is, selling before a scheduled maturity or redemption period. The LGC, Inc. financial statements reveal that for the last three reported years available at hearing the health trust's funds were: in 2008, $63,543,103.00 invested with 44.6% placed in investment vehicles in excess of 5 years; in 2009, $57,020,943.00 were invested with 49.2% placed in investment vehicles in excess of 5 years; and in 2010, $45,892,240.00 were invested with 80.8% placed in investment vehicles in excess of 5 years.[30] To have these large sums invested in such longer term investments is another indication of the excess earnings and surplus available and retained by the LGC, Inc. health trust and is an improper retention that violates RSA 5-

[30] These investments exclude cash and cash equivalents immediately available to LGC health trust during the same three years of $54,243,103.00 for 2008; $41,698,180.00 for 2009; and $52,523,731.00 to pay claims or expenses.

B:5, I (c). Of additional concern to the political subdivision members of the health trust and property liability trust may also be the inclination of its investment manager and chief financial officer to urge the board to be “more aggressive” in placing its investments and advising that “you are leaving money on the table” as indicated in LGC, Inc. meeting minutes, especially when this investment advice to take more risk occurred in year 2007. In addition to the length of maturity disparity, the pooled risk management program members’ funds are invested by the LGC, Inc. in accordance with its own investment policy that, while not expressly mandated by RSA 5-B, may be already more aggressive than it might otherwise be.

Another action undertaken by the LGC, Inc. controlled health trust involved its practice of inflating the premium rate charged to the political subdivisions that were members of its January pool. The LGC, Inc. engaged in a process for its rate setting that provided a projected premium rate to many, but not all, of its members several months prior to the final establishment of the actual rate to be charged for the upcoming coverage year. This preliminary rate was referred to as the guaranteed maximum rate (GMR). This GMR acted as an early warning or early assurance to the members that whatever the later actual rate was going to be, it would not exceed this GMR. This early GMR allowed the member municipalities, school districts and counties to continue with their own budget planning knowing that they would not receive a surprise spike closer to the passage of their own annual budget. However, those political subdivisions that operated on a calendar year budget cycle, *i.e.* members of the January pool, did not receive the benefit of such a notice. Instead they were only provided with an actual premium rate in October or November for their budget to begin January 1st. The LGC, Inc. board and management would arbitrarily “build in” an additional amount into the January pool’s actual premium, thereby affecting the alleged annual actuarially accurate premium amount. Such arbitrary increases to the

premium rates charged to January pool members violates the provisions of RSA 5-B:5, I (c) by inflating the amount of earnings flowing into, and retained by, the health trust in excess of what the actuarially based needs of the program were allegedly computed to be, in violation also of RSA 5-B:5, I (f) which requires the health trust to:

> (f) Provide for an annual actuarial evaluation of the pooled risk management program. The evaluation shall assess the adequacy of contributions required to fund any such program and the reserves necessary to be maintained to meet expenses of all incurred and incurred but not reported claims and other projected needs of the plan.

This statutory reference also leads to discussion of another practice followed by the LGC, Inc. controlled health trust involving actions the board and management took relating to its self-selected "target" for the retention of excess earnings and surplus as its own net assets. It also involves their actions in utilizing what the LGC, Inc. and its entities call its annual rate setting process. The actual dollar figures that have been retained by the LGC, Inc. and its entities are depicted in tables appearing earlier in this decision. The use of a "target" number is commonplace in the insurance industry. It also seems to fluctuate among insurance-like entities, including pooled risk management programs, depending upon variations of risk factors from time to time that affect the calculations needed to set the desired or "targeted" amount of net assets as actuarially determined.

As previously stated, our RSA 5-B is unique. It also provides a "target" amount for pooled risk management programs operating in New Hampshire. That target is the excess of members' earnings and surplus after permitted deductions are retained pursuant to RSA 5-B:5, I (c). Determining this excess is a matter of mathematics not magic. The only reasonable interpretation of the statute is that the components in the formula themselves must be reasonable. Setting a "target figure" does not appear

anywhere within the statute. A "target" is not a component of the standards of RSA 5-B:5, I (c). The target and the process used in connection with that target relates to the component referred to as "reserves" that does appear in the statute. And the hearing officer determines that these reserve amounts must be reasonable in light of the "golden rule" of reasonable statutory construction cited earlier[31] and the statute's stated purpose to lower costs and provide anticipated returns to the health trust's members. RSA 5-B:5:1.

The LGC, Inc. health trust "target" is an arbitrary number set by the LGC, Inc. board and obviously not a limit on its retention policy because it retained greater ratios in certain years despite substantially exceeding it. (See Table 1). The present target of the LGC, Inc. health trust, and it's confessed target since the 2003 reorganization, is equivalent to a RBC ratio of 4.2, except when the board tacked on an additional RBC 0.5. In the life of the health trust there is insufficient evidence to determine the exact date on which the health trust decided upon its first target. But whenever that was we are told by its long time executive director, Andrews, that "we tried to have 20% of claims." However the LGC, Inc. health trust originally used this 20% of claims figure as its target for net assets including additional reserves.[32] Prior to the LGC, Inc. reorganization in 2003 the health trust continued to operate with the 20% figure as its target, but as Table 1, above, shows it continued in operation for at least a decade while reporting a much more important figure. The more important figure was the actual amount of net assets or members balance it retained. In 1994 while its target was 20%, its actual retention of earnings and surplus was reported as 30.2%. The target figure had no impact on the health

[31] "When one of several possible interpretations produces an unreasonable result, that is a reason for rejecting that interpretation in favor of another which would produce a reasonable result." 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 45:12 (7th ed. 2007).
[32] This reserve category is in addition to the claims reserve account held by the health trust to cover the cost of claims and of claims incurred but not reported (IBNR).

trust's actions. It ignores its own target. The health trust did not even return its own acknowledged excess to its members in that year. As discussed in detail earlier in this decision, the lowest level of net assets occurred in 1997 representing 7.6% of claims (RBC 1.22) and the health trust steadfastly maintained in a memorandum to its members and informed the public through the use of media at that time, that it was financially sound and in no danger of being unable to cover its claims and costs of administration. It nearly doubled its net assets the very next year to 14.23% of claims.

In 2002, just prior to the LGC, Inc. reorganization, its net assets were reported to be 14.2% of claims. The BSR witness Atkinson credibly testified that that percentage is the approximate equivalent of RBC 2.1. However, following the reorganization in 2003, the LGC, Inc. board and staff changed from a target expressed as a percentage of claims. They reportedly set a "new" target, utilizing the rate based capital (RBC) methodology. However, they set it at RBC 4.2, approximately twice the previous year's net assets. This result merely indicates that there really wasn't much new about the "new" target. Nor should much difference have been expected[33] because the board did not seek a pure RBC ratio but an RBC ratio that would support its rationale for accumulating an excessive amount of assets.

The newly expressed "target" set by the board using an RBC ratio proved no less illusory than the 20% of claims target did in earlier years. Using the several improper practices discussed in this decision above, the LGC, Inc. was soon reporting actual net assets in excess of its own self-selected "target" at levels in 2005 equivalent to RBC 4.5; in 2006 equivalent to RBC 6.0; and in 2007 equivalent to RBC 6.7. As before, the target figure had no impact on the health trust's actions. It ignored its own

[33] The actuary, being the only outside actuary ever used by LGC and its entities since 1988, consulted with the same third party administrator, the same executive director, the same financial officer, the same strategic consultant, and the same health trust program manager before switching to an RBC modality from the more direct 20% figure they initiated as their target almost 25 years ago.

target. The health trust did not return even its own designated excess to its members as required by the statute.

These hard figures weigh heavily against and diminish both the weight and the credibility of evidence offered by witnesses called by LGC, Inc. and its entities and the sole witness called by respondent Carroll that the LGC, Inc. and its entities always "acted in the members' interests." These figures also contribute to my determination that the LGC, Inc. and its entities paid little attention, if any, to the requirement that funds in excess be returned to members of pooled risk management programs. Therefore by reason of the actions and practices undertaken by the LGC, Inc. and its entities detailed above, the hearing officer finds that those entities have violated the provisions of RSA 5-B:5, I (c). The hearing officer further finds that the LGC, Inc. and its entities are indebted to the members of the health trust and, to a lesser extent, to the members of the property liability trust, and that the LGC, Inc. is presently in control of funds in excess of the earnings and surplus of these two pooled risk management programs that a reasonable interpretation of the standards provided in RSA 5-B:5, I (c) would require be returned to each program's members.

The Bureau of Securities Regulation alleges that the personal conduct of both Peter Curro, board member, and Maura Carroll, presently executive director, as individuals, violates the provisions of RSA 5-B. The BSR argues that Curro's votes in favor of restructuring the LGC entities, to subsidize the workers' compensation program, and to adopt a net asset target of an RBC of 4.2 prove his participation in the actions that violated RSA 5-B.

The evidence did show that Curro was on the board of NHMA Health Trust when it voted to merge with NHMA and NHMA Property/Liability in 2003. He was on the NHMA HealthTrust board

when it voted to contribute funds to establish a worker's compensation program a few years before the merger. He was on the LGC, Inc. board when it voted to set its RBC level at 4.2. Curro's individual votes as demonstrated by participation in the above board decisions for the health trust and then subsequently, LGC, Inc., are insufficient to find that he personally violated the standards of 5-B. The board, duly convened and acting as a unit, is made the representative of the company. Fletcher's Cyclopedia of the Law of Corporations § 392. The assent or determination of the members of the board acting separately and individually is not the assent of the corporation. *Id.* After reviewing the minutes of all of the board and committee meetings I cannot find by a preponderance of all evidence that he personally violated the standards of RSA 5-B. Therefore I determine that Curro, acting in an individual capacity, cannot be determined to have violated the provisions of RSA 5-B, and dismiss Counts I and II against him.

Similarly, BSR argues that Carroll failed to recommend corrective action for LGC's violations of RSA 5-B, including overcapitalization at an RBC of 4.2, failure to return excess net assets to members, returning surplus by discretionary rate stabilization, and utilizing a single third-party board and bylaws in a parent-subsidiary structure. BSR argues that as an executive of LGC with management responsibilities, Carroll is personally liable for her participation in LGC's violations of RSA 5-B.

Carroll claims that as an executive director, she owed the duties of an agent only. She maintains that she implemented policies determined by the board of directors, and had no authority to deviate from them. Carroll admits that, acting at the suggestion of members, she recommended that the board transfer funds from the workers compensation program to health trust over a period of time and with interest payments. Despite her recommendation, the board rejected important aspects of it. The board, ignoring

her lawful and reasonable recommendation, made the ultimate decision, to execute a note evidencing an obligation but included neither a date certain nor any interest on principal payment. That act evidenced two things, that they never understood the true obligation to the members of the health trust program to protect those members' interests and, that Carroll lacked the power to override board of directors' decisions or to direct the board to reach a different conclusion.

The evidence presented indicates that Carroll did not have the ability to influence the LGC, Inc. board of directors. Under the LGC, Inc. bylaws Carroll, as an executive director, had a duty to carry out the policies established by the Board. As evidenced by the direct rejection of Carroll's recommendation to structure the promissory note with interest for the return of the $17M to health trust, Carroll did not have sufficient influence over the board that she inherited from her predecessor who may well have had sufficient influence as a result of holding the position for 34 years. There was little other evidence provided by the testimony and exhibits to establish that she personally violated the standards of RSA 5-B. Therefore I find that Carroll has not individually violated RSA 5-B, and dismiss all allegations against her arising from RSA 5-B.

RSA 421-B Securities

Counts III, IV, and V, collectively referred to as the "Securities Counts," allege several violations of the New Hampshire Securities Act. Count III alleges that LGC, Inc. engaged in the offer or sale of unregistered securities in violation of the New Hampshire Securities Act, specifically, RSA 421-B:11. Additionally, Count III alleges that under RSA 421-B:6, LGC, Inc. is a broker-dealer who must be licensed to offer or sell securities, and that health trust, property liability trust, and workers

compensation trust are issuer-dealers who must be licensed. The BSR petition, as amended, also alleges that Carroll is an agent who must also be licensed to offer or sell securities. Count IV alleges that under RSA 421-B:26, III-a, Carroll and Curro either knowingly or negligently aided LGC, Inc. in selling unregistered securities. Lastly, Count V alleges that under 421-B:3, the respondents failed to disclose material facts in connection with the offer or sale of securities, and that the respondents engaged in actions that operate a fraud or deceit on their members by using member funds held in 5-B pools for non-pool purposes.

Preceding any analysis of alleged violations of the New Hampshire Securities Act, the instrument that the petitioner alleges is a security must be examined to determine whether it does in fact qualify as a security under the appropriate test. The BSR alleges that risk pool contracts, *i.e.* contracts for membership in the 5-B pools, also referred to as participation agreements, and NHMA LLC membership contracts, are securities and must be registered before being offered for sale or sold in New Hampshire. Yet, there has been no testimony provided nor exhibits admitted to support the claim that NHMA LLC membership contracts exist beyond the mere form indicating a membership fee must be paid by political subdivisions to NHMA LCC as a concomitant requirement for participation in a pooled risk management program. There is no other supplemental contractual writing evidencing additional terms of the membership relation and a lack of sufficient testimony establishing the relationship between a NHMA LLC member and that limited liability company. Therefore the hearing officer determines that the BSR has not sufficiently carried its burden on the fact that the membership fee agreement should be considered a "security."

We look then only to the risk pool contracts, specifically, the 2000 and 2008 participation agreements admitted into evidence, to ascertain whether they are in fact securities under the appropriate test. To do so we look to the appropriate test to apply to determine whether the risk pool contracts are securities. Pursuant to the New Hampshire Securities Act, RSA 421-B:2, XX (a), an investment contract is considered a security, therefore, if a risk pool contract qualifies as an investment contract, it also qualifies as a security. Developed under Federal Securities law and adopted by the United States Securities and Exchange Commission, the analysis applied to determine whether an agreement constitutes an investment contract is the *Howey* test. *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

Under the *Howey* test, “an investment contract, for purposes of the Securities Act, means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise.” *SEC v. W.J. Howey Co.*, 328 US 293, 298-99 (1946). Thus, the four basic elements of the *Howey* test are: (1) the investment of money; (2) in a common enterprise; (3) with the expectation of profits; and (4) to come solely from the efforts of others. Since the *Howey* test requires a satisfaction of all four elements, if one element cannot be satisfied, the risk pool contracts are not deemed securities.

Reviewing the third element of *Howey*, “expectation of profits,” under the preponderance of the evidence offered at hearing the political subdivisions that enter into risk pool contracts do not do so with the expectation of profit. Rather, they enter into these contracts to acquire and use insurance products and insurance coverage, such as healthcare, dental, workers compensation, and property liability and to

obtain risk management services. A contract is a security where the purchaser is motivated to invest by the potential for profits, not solely by a desire to consume the product purchased. The United States Supreme Court in *United Housing v. Forman* addressed this "profit motivation" aspect and cited to the definition of "profit" in this context, explaining that:

> The touchstone is the presence of an investment in a common venture premised on a reasonable expectation of profits…By profits, the Court has meant either capital appreciation resulting from the development of the initial investment…or a participation in earnings resulting from the use of investors' funds…In such cases, the investor is 'attracted solely by the prospects of a return' on his investment…By contrast, when a purchaser is motivated by a desire to use or consume the item purchased…the securities laws do no apply.

United Housing v. Forman, 421 U.S. 837, 852-53 (1975).

In *Forman*, participants in a rental-housing program were required to buy shares of "stock" in order to lease an apartment in the rental housing facility. *Forman*, 421 U.S. at 842. Although the term "stock" was employed, in a traditional sense, the purchase was comparable to a deposit on the rental home. *Id.* Ascertaining whether the "stock" was considered a security, the United States Supreme Court noted that, "form should be disregarded for substance and the emphasis should be on economic reality." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *see also Howey*, supra, at 298. The U.S. Supreme Court disregarded form for substance concerning the "stock" purchased and found there was no "doubt that investors were attracted solely by the prospect of acquiring a place to live, and not by financial returns on their investments." *Forman*, 421 U.S. at 853. Additionally, the U.S. Supreme Court concluded that even where tenants received a rent rebate for the expenses of the housing facility, the purchaser was still motivated by a desire to use or consume the item purchased. *Id.*

Similar to *Forman*, the question here is whether the purchaser of a risk pool contract does so with the expectation to earn a profit or to use or consume the insurance product, service, or coverage purchased. As addressed first by *Howey*, and later *Tcherepnin*, form should be disregarded for substance and the economic reality of the transaction must be analyzed. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *see also Howey*, supra, at 298. LGC, Inc. offers pooled risk management programs to political subdivisions within the state of New Hampshire as an alternative to traditional insurance products. LGC, Inc. pools the political subdivisions' premiums that are then invested and managed by LGC, Inc.'s professional staff and retained consultants. The agreement made between LGC, Inc. and its members is a contractual one, where a participating municipality is asked to provide a contribution, in the form of a premium, in exchange for coverage in a pooled risk management program. The contributions are based on the number of employees a political subdivision has and what the medical claims experience has been for that subdivision, factors that typically drive insurance programs not investment decisions. Additionally, each of the participating agreements is for a finite period of time, sometimes only one year.

Moreover, the language of the risk pool contracts neither states nor implies that an investment is being made by the political subdivision, but that insurance coverage is being purchased. For example, the 2000 participation agreement for the health trust contracts with municipalities to become members of the then NHMA, Inc. and to receive the benefit of the programs offered through the health trust. The 2000 "Resolution for Participation in the Multi Year Rate Guarantee Program" contract for the property liability trust offers incentives for joining, such as: a return of 2 ½% of the renewal contribution for coverage period of July 1, 1997 to June 30, 1998, a 5% reduction in trust rates from July 1, 1998 to June 30, 1999, and no increase in trust rate for July 1, 1999 to June 30, 2000. Further, the "Resolution for

Participation in the Multi Year Rate Guarantee Program" is distinguished from offering a profit because the contract stresses that the reduction and guarantees are with respect to rates and not the total amount of contributions, which may increase or decrease depending upon underwriting exposures. The contracts for pre-determined rates for future years are incentives to join a pooled risk management program to acquire insurance coverage or obtain risk management services, they do not constitute an advertisement to earn profit from an investment.

Additionally, the 2008 participation agreement contracts with municipalities to become members of NHMA LLC as a provision to the LGC, Inc. bylaws Section 3.7, and to participate in either of the following pooled risk management programs: health trust, property liability trust, workers compensation trust, and unemployment benefits. Addendum 4 to the 2008 participation agreement includes a "Multi Year Rate Guarantee Program" for the property liability trust for the periods of July 1st to June 30th of 2009, 2010, and 2011, where the rates are predetermined but if the underwriting exposures are reduced or increased for a member, then the amount of contribution is adjusted accordingly. Similarly, Addendum 5 includes a similar contract for the workers compensation trust for a "Multi Year Rate Guarantee Program," where the rates are predetermined but if the underwriting exposures are reduced or increased for a member, then the amount of contribution is adjusted accordingly. Lastly, Addendum 7 includes a "First Rate Package Pricing Agreement" for members who are enrolled in the property liability trust, workers compensation trust, and the health trust, that contracts with members to receive a credit against the price of protection provided by the workers compensation trust and further, if members additionally participate in the "TRiM Program," they receive an additional credit to the previously mentioned credit from the workers compensation trust. Again, the contracts for multi-year pre-determined rates are incentives to join a pooled risk management program and acquire

insurance coverage or obtain risk management services, they are not an advertisement to earn profit from an investment.

Likewise, the LGC, Inc. bylaws highlight the purpose of the organization, to provide insurance to political subdivisions by managing healthcare, property-liability, and workers compensation risks. The participation agreements do not advertise that a political subdivision is paying money into an investment vehicle from which they should expect a profit or in the case of a not-for-profit pooled risk management program, earnings. Rather, reviewing the language of the documents, a participating political subdivision would believe that they are paying a contribution in exchange for a risk coverage program from which they may receive excess earnings and surplus, not paying into an investment. The argument made that dividends or rate credits are a form of profit that satisfies the "expectation of profit" element of *Howey* is addressed later in this decision.

As testified to by Curro, at no time did he, as a participating member, have the intent that the purchase of insurance would be an investment in the health trust or LGC, Inc. Furthermore, Curro testified that that he did not have an expectation that the purchase of insurance through the health trust or LGC, Inc. was for profit. Attorney Loughlin, an experienced municipal law practitioner, also echoed a similar sentiment during his testimony, that to the best of his knowledge, municipalities have a need to buy health insurance for their employees and that is why they go into the marketplace, not to invest town funds. Lastly, Andrews testified that he did not think political subdivisions believed that LGC, Inc. was an investment vehicle, rather that it was held out as an insurance vehicle. Applying the preponderance of the evidence standard, political subdivisions were attracted "by the prospect of acquiring" an insurance product or coverage, "not by financial returns on their investments." *Forman*, 421 U.S. at 853.

The petitioner has further argued that an "expectation of profit" existed in the promise of dividends or rate credits for future participating years. A return of profits can take the form of capital appreciation, dividends, or a stated fixed return to investors. Additionally, the one commonality of profits is that they all essentially involve a return of money, whether through dividends or an offset to another necessary cost. However, the profit that *Howey* refers to is the profit to the person who is putting money into the enterprise, not the profit that the company itself receives from its ongoing investment or operating activities.

Two cases are instructive in this matter, *Dryden* and *Collins*, where the issue at hand involved whether insurance policies could be characterized as securities. *Dryden v. Sun Life Assurance Company of Canada*, 737 F.Supp. 1058 (S.D. Ind. 1989); *Collins v. Baylor*, 302 F.Supp. 408 (N.D. Ill. 1969). Both courts held that the insurance policies were not securities because the purchasers did not expect a profit by way of [investment] "dividends" returned to the members. *Dryden*, 737 F.Supp. at 1063; *Collins*, 302 F.Supp. at 411. As described in *Dryden*, "under a participating life insurance policy issued by a mutual insurance company, the 'dividends' paid are in fact a return of excess premiums paid in by the policyholder, rather than a share of the company's investment profits." *Dryden*, 737 F.Supp. at 1062. The dividends are not "profits as in the case of an ordinary corporation." *Dryden*, 737 F.Supp. at 1063.

Collins discussed that it "is not the expectation of anyone buying these kinds of [insurance] policies that they are going to be sharing in the profits of a company." *Collins*, 302 F.Supp. at 411. The "so-called dividends are, in reality, not dividends, but in a mutual insurance company are merely a return to policyholders of the unearned, that is, unused portion of the premium paid in." *Collins*, 302 F.Supp. at 411.

In the case of LGC, Inc., until expended to pay claims or operational expenses, most of the funds contributed by the members are invested in the market. LGC, Inc. is similar to standard insurance companies in that they engage in investment practices through a third party. LGC, Inc. employs both an investment manager to handle the investment portfolio as well as an investment advisor who supervises the investment manager. Any dividends that are returned to the members are not a share of LGC, Inc.'s investment profits, as one would typically characterize the profits of a private corporation. Rather, they are "merely a return" to the political subdivisions of the "unused portion of the premium paid in," which has usually been invested in the market to the benefit of the members. Collins, 302 F.Supp. at 411. The LGC, Inc. bylaws, 5.1 and 5.2, states that an excess in earnings and surplus may be returned to members. Where a property liability trust informational release statement utilizes the word "dividends," it does so to describe a return in member premiums, not profit. As Attorney Murphy testified to, "dividends" in essence, are excess premiums, a term of art commonly used in the insurance world. In fact, LGC, Inc. returned dividends to the Town of Warren in two instances, one for the period of 1990-1995, and the other for the period 1994-1996. Additionally, as Keeffe testified, in the years 2002-2003, surplus from the property liability trust was returned to members in the form of dividends. Again, these returns were not profits on investments made by the political subdivisions, but a return of surplus, thereby, constituting excess premium.

By contrast, a rate credit that is issued to a political subdivision is distinguished from a dividend in that it is not a return on excess premium, but more analogous to a rebate for future participating years. As Andrews testified, rate crediting was employed in 2008 as a substitute to issuing cash dividends to political subdivisions. In the past, LGC, Inc. has advertised that a risk pool management program invests premiums and the profit resulting from third party investment practices is used to reduce rates for the

participating political subdivisions. It is also noted in LGC, Inc. materials that "members prefer that funds be returned to them in the form of rate decreases over subsequent rating periods." These above examples are similar to *Forman*, where an informational bulletin distributed to prospective residents advertised that "if rental charges exceed expenses, the difference will be returned as a rebate." *Forman*, 421 U.S. at 853-54. The US Supreme Court found that "nowhere does the Bulletin seek to attract investors by the prospect of profits." *Forman*, 421 U.S. at 854. These rebates were not the "kinds of profits traditionally associated with securities." *Id*.

Here, we have a similar case of rate credits being advertised and offered to prospective participating political subdivisions. Yet, these rate credits do not "seek to attract investors by the prospects of profits." *Forman*, 421 U.S. at 854. Consequently, when employing the rate crediting process, surplus is not credited just for the following year, but over multiple years into the future for those political subdivisions that choose to acquire insurance through LGC, Inc. for that extended period. The political subdivision is still motivated by the desire to use or consume the product purchased, whether or not a rate credit happens to be incidental to participation in a pooled risk management program. Rate credits issued to a political subdivision are not the "kinds of profits traditionally associated with securities" and they fail to satisfy the "expectation of profit" element of *Howey*. *Forman*, 421 U.S. at 854. Considering that the expectation for entering into the risk pool contracts is for the consumption of a product rather than an expectation of profit, risk pool contracts fail to satisfy this element of the *Howey* test, and therefore, are not securities.

Since the *Howey* test requires a satisfaction of all four elements, and the pooled risk management program contracts fail to satisfy at least one of these *Howey* elements, the "expectation of profit," we

need not continue the analysis of the other three *Howey* elements to make a determination. Under the *Howey* test, these contracts are found not to be investment contracts for the purposes of this securities analysis.

Since the RSA 5-B pooled risk management participation agreements do not constitute securities, no further discussion is necessary of the alleged violations of RSA 421-B by the respondents included in the remaining Counts III, IV and V as they require the offering and selling of securities. Concluding in this manner, the hearing officer finds no violations of any provision of RSA 421-B. Therefore the complaints of violations of any provision of RSA 421-B contained in the BSR petition as amended, are dismissed against the LGC, Inc. and all of its entities and dismissed against the two remaining individuals named as respondents.

There are numerous other administrative practices that are maintained by the LGC, Inc. in exercising its control over members of the health trust pooled risk program that may not directly violate the statutory provisions addressed by this decision but should, in light of this decision and accompanying order, be considered in any discussions regarding changes in governance and financial management. Several are noteworthy and reflect the irony common to the operation of the LGC, Inc. and its entities. The first relates to a series of actions that contradicts a purported rationale for some of its reorganization actions. Its consultant, Emery, explaining the need for reorganization and defending its need to maintain LGC, Inc. controlled programs in the market against a competitive rival, Primex, testified that, “Monopolies are scary things.” Yet the LGC, Inc. makes decisions related to its own health pooled risk management programs that are monopolistic in design. These include: (1) mandatory membership in another of its entities, the NHMA, LLC; (2) contractual “lock out” provisions preventing

program members which have left the program from being able to rejoin the program without special authorization of the board of directors for a period of two years; (3) entering into multiple year agreements with Anthem Blue Cross Blue Shield which prevent political subdivisions with over 50 employees, except Manchester and Nashua, from being able to obtain health insurance products from Anthem without joining the LGC, Inc. health trust; and (4) employing private marketing practices to eliminate competition that it once declared unethical; in combination with the previously mentioned dilution and control in governance.

A second practice that adds irony to the operation of LGC, Inc. and its entities relates to the testimonial profession of its witnesses that its purpose is to serve the members' interests, which implies those of the health trust members. The following LGC, Inc. practices and actions do not reflect the testimony: (1) informing its membership after consideration of and after decisions regarding major actions affecting each member, as in its reorganization and the subsidizing of a separate trust; (2) continually renaming line items in its financial reporting and using vague terms that shield the actual purpose of the transaction; (3) arbitrarily deciding to eliminate the provision of certain types of information to members, as in "condensing" minutes of a critical board meeting crucial to the operation of the conglomerate, and omitting the distribution of detailed year end financial reports of the financial transactions of the LGC, Inc. "parent" to the political trust members because it would make the financials "too long"; and, (4) preliminarily circulating the minutes of board and committee meetings to management team members to permit editing before providing the minutes to the actual board or committee members for approval at the bodies' next meeting months in the future.

A third practice reflects an irony related to its investment policy. The LGC, Inc. is purportedly the state's largest representative of municipalities and it purportedly operates one of the largest, if not the largest, insurance-type pooled risk management programs in the country. It's board and staff witnesses testify that they fully appreciate the responsibility of protecting the members' funds and employ conservative practices to have sufficient reserves on hand. However, credible testimony was offered that almost 20% of its portfolio of investments fell outside the parameters established by existing statutes that limit the nature of investments of New Hampshire municipalities and that limit the nature of investments of other insurance entities. No regard appears to have been made to investment limitations despite the LGC, Inc. board being largely comprised of municipal officials and governing programs that operate like insurance entities.

A fourth practice that has the opposite effect than that declared in testimony relates to board of directors' membership. While emphasizing the representativeness of its 31 member board of directors and its close involvement in the process of decision-making relating to the health trust, several characteristics of membership and process minimize the effectiveness of either. These include: (1) the manner of appointment of individuals to fill unexpired terms of elected members; (2) the size of the board of directors resulting in the inability to fill all 31 positions of the board and the scheduling and duration of the meetings more convenient to staff than members that results in only 6 or so elected officials being present at most meetings of the board of directors; (3) the relatively few decisions made by recorded vote; and (4) the characterization of dissident comments made by individual board members reflected in any minutes or legislative testimony as reflective of "robust" discussion, when read in context they appear more reflective of admonitions or expressions of conscience by professional public

managers, public employees and elected officials that are lost in the forward advance of the conglomerate interest.

ORDER

For the reasons appearing in the narrative decision above and provisions below it is hereby ordered as follows:

(In the provisions of this order, the Local Government Center, Inc., Local Government Center Health Trust, LLC, and the Local Government Center Property-Liability Trust, LLC are collectively referred to in this order as the "LGC, Inc." unless otherwise required to be specified.)

1. No 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.

2. Failing timely re-organization as ordered above in § 1, the LGC, Inc. is deemed to continue in violation of RSA 5-B, and this order, including the order to cease and desist, and shall, pursuant to the authority extended in RSA 5-B:4-a, I and II, be penalized by 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 as it, nor any existing insurance program as presently operated

by LGC, Inc. shall be deemed to be a "pooled risk management program" as defined by RSA 5-B.

3. The remainder of this order shall be construed to apply to the risk pool management programs currently known as Local Government Center Health Trust, LLC, and the Local Government Center Property-Liability Trust, LLC however they may be organized in the future.

4. The Local Government Center's risk pool management programs, however they may be organized in the future, shall not require participating members to join or participate in any organization that requires the payment of dues for membership in said organization, nor shall any of the risk pool management programs require members to pay fees, premiums or costs for services not specifically identified and approved in RSA 5-B.

5. The parties have litigated this dispute by agreement based upon the 2010 year-end audited financial statements and this Order is issued, contingent upon said agreement, based upon those financial statements. Absent an express agreement that the BSR and the LGC, Inc. entities agree to update the figures appearing in those statements, the figures and amounts stated herein shall govern.

6. The Local Government Center's Health Trust risk pool management program holds $86,781,781.00 in total net assets from earnings and surplus as an additional reserve amount beyond other amounts that have been set aside to cover costs of administration

and claims. The program holds no funds for costs of reinsurance because it abandoned purchasing reinsurance effective June 30, 2010. This amount of earnings and surplus it retains, consistent with the narrative decision, is unreasonably high representing approximately 24% of claims. Again, consistent with the narrative decision and specifically relying on historic net asset figures, historic actual RBC ratio's, contradictory testimony and the arbitrary assignment of risk percentages that can invade risk based capital (RBC) calculations which in turn can yield a divergent result depending upon the underlying stochastic model utilized, the amount of excess of earnings and surplus declared currently held by LGC is $33,200,000.00. This amount is based upon a calculation that limits LGC to a reserve, in addition to its costs of administration and claims, equal to 15% of claims, a straightforward method of reserve calculation familiar to both the BSR and the LGC. This amount shall be returned to members of that program in proportion to each member's contributions to that standing amount of earnings and surplus.

7. The return of the $33,200,000.00 amount shall not be affected by the cost of returning to the practice of purchasing reinsurance by the Local Government Center's Health Trust which practice is so ordered immediately.

8. The Bureau of Securities Regulation and the Local Government Center shall confer and within 30 days from the date of this Order shall submit to the undersigned hearings officer an agreed upon plan for the return of this $33,200,000.00 excess amount in cash to

members who participated in the Local Government Center's Health Trust risk pool management program at any time after June 14, 2010. A negotiated plan may include prospective returns of cash or its equivalent. Failing the submission of the agreement within 30 days from the date of this Order, the Local Government Center's Health Trust risk pool management program, in whatever form it may be organized, shall return the $33,200,000.00 excess amount in cash to members that participate in the Local Government Center's Health Trust risk pool management program on the date of this order, no later than September 1, 2013 in proportion to the premiums paid by said members.

9. These proceedings have revealed numerous tangential issues that relate to the continued existence of pooled risk management programs enabled by RSA 5-B that demand the responsible attention of the legislature and the BSR. In future years until such time as pooled risk management programs involving captive markets, such as all political subdivisions within the state, may be further addressed in that manner, a reasonable amount of earnings and surplus that may be retained by the Local Government Center's Health Trust, however it may be organized, which the hearing officer determines, consistent with the narrative decision and a reasonable interpretation of RSA 5-B:5, I (c), as applied to the issues presented by these proceedings, is the equivalent of fifteen percent (15%) of claims or an RBC 3.0 as determined by the BSR, whichever is the less, based upon the year end audited financial statement of the Local Government Center's Health Trust risk pool management program.

10. All amounts in excess of fifteen percent (15%) of claims or in excess of an RBC 3.0 actuarial analysis which must be approved by the BSR consistent with its supervisory authority and which it shall exercise in good faith, or the lesser of the two calculations, shall annually be returned in the form of cash, dividends or similar cash equivalents to members. Until such time as the legislature may address pooled risk management programs by legislation or regulatory rules, the BSR, consistent with its existing supervisory powers under RSA 5-B which it shall exercise in good faith, may upon prior written notice of at least one (1) year impose a higher limit or different methodology for calculating required net assets that may be retained as earnings and surplus not in excess pursuant to RSA 5-B:5, I (c) as long as said methodology is specifically based upon a generally accepted actuarial analysis.

11. The parties did not propose a means of calculating the required net assets for the Local Government Center's other risk pool management programs except to the extent that the Local Government Center, through the testimony of its chief financial officer, admitted that it holds approximately $3.1 million in excess surplus in its Property and Liability program. The Respondents also did not attest to the use of an actuarially based means of determining the required net assets for this risk pool management program. It is Ordered that the Bureau of Securities Regulation and the Local Government Center shall confer and within 30 days from the date of this Order shall submit to the undersigned hearings officer an agreed upon plan for the return of the $3.1 million surplus in cash to members who participated in the Local Government Center's Property and Liability risk pool management program at any time after June 14, 2010. A negotiated plan may include prospective returns of cash. Failing agreement,

the Local Government Center's Property and Liability risk pool management program, in whatever form it may be organized, shall return the $3.1 million surplus in cash to current members of the Local Government Center's Property and Liability risk pool management program on the date of this order, no later than September 1, 2013 in proportion to the premiums paid by said members.

12. In the future the Local Government Center's Property and Liability risk pool management program, however it may be organized, shall utilize a generally accepted actuarial analysis to determine its required net assets and shall annually return any excess surplus in cash, dividends or their equivalents to members. The generally accepted actuarial analysis must be approved by the BSR consistent with its supervisory authority which it shall exercise in good faith.

13. The Local Government Center Property Liability Trust, LLC, however it may be organized in the future, shall re-pay the $17.1 million subsidy to the Local Government Center Health Trust risk pool management program, however it may be organized, no later than December 1, 2013. Said payment shall terminate and shall satisfy any obligation contained in a note of similar amount executed on June 2, 2011. The funds to make this re-payment may be borrowed from an independent entity at commercially reasonable terms in consultation with the Bureau of Securities Regulation in the exercise of its supervisory powers which shall be exercised in good faith.

14. Funds received by the Local Government Center Health Trust in re-payment of the subsidy, to the extent they constitute amounts in excess of the earnings and surplus of the Local Government Center Health Trust risk pool management program as reasonably determined and expressed above in § 9, shall be returned to members consistent with RSA 5-B:5, I (c).

15. Within 90 days of the date of this order, the Local Government Center, Inc. shall cause Local Government Center Real Estate, Inc. to convey to the Local Government Center Health Trust risk pool management program and the Local Government Center Property Liability pooled risk management program shares in the ownership of the real estate corporation in proportion to their initial in kind contributions and subsequent cash contributions. To the extent the parties agree to consider a decision by the Local Government Center Property Liability pooled risk management program to forego ownership of its proportionate shares in deference to the repayment of the subsidy, *see* § 13 above, they may do so by agreement. The realty corporation, in proportionate share, will then be managed by the respective boards of directors of the risk pool management programs for the benefit of those programs.

16. In light of other provisions of this decision and order, no fines as referenced in RSA 5-B:4-a, VII (a) are assessed against any respondent.

17. To the extent that this order requires the return of funds or property in the alternative, this order requires compliance with these provisions as restitution or disgorgement pursuant to RSA 5-B:4-a, VII (b).

18. The Local Government Center, Inc., Local Government Center Health Trust, LLC and the Local Government Center Property Liability Trust, LLC are found jointly and severally liable for the costs of the investigation in this matter, and all related proceedings, including reasonable attorney fees, pursuant to RSA 5-B:4-a, V and are ordered to pay same. The BSR and these respondents shall confer within 30 days of the date of this order to determine an agreed upon amount of costs to be paid. Failing agreement, the parties shall agree upon a mediator to submit the question of costs and fees as addressed in RSA 5-B:4-a due to the office of the secretary of state and failing the issue being successfully mediated within 45 days of the date of this order, the BSR shall submit to the hearing officer within 45 days of the date of this order its itemization of costs for which it seeks reimbursement.

19. All parties and counsel and staff shall continue to preserve and maintain all electronic communications that were transmitted from the hearing room and related to the proceedings being conducted therein which were distributed via any and all means of electronic social networks, including but not limited to Facebook, Twitter, Linked-in, or other group bulletin boards or personal or entity websites, until such time as these proceedings have ended or until further order.

20. All motions to dismiss and for summary judgment, are hereby declared moot consistent with this narrative decision and order.

21. In light of the foregoing, the Secretary of State's September 2, 2011 Cease and Desist Order is hereby made permanent.

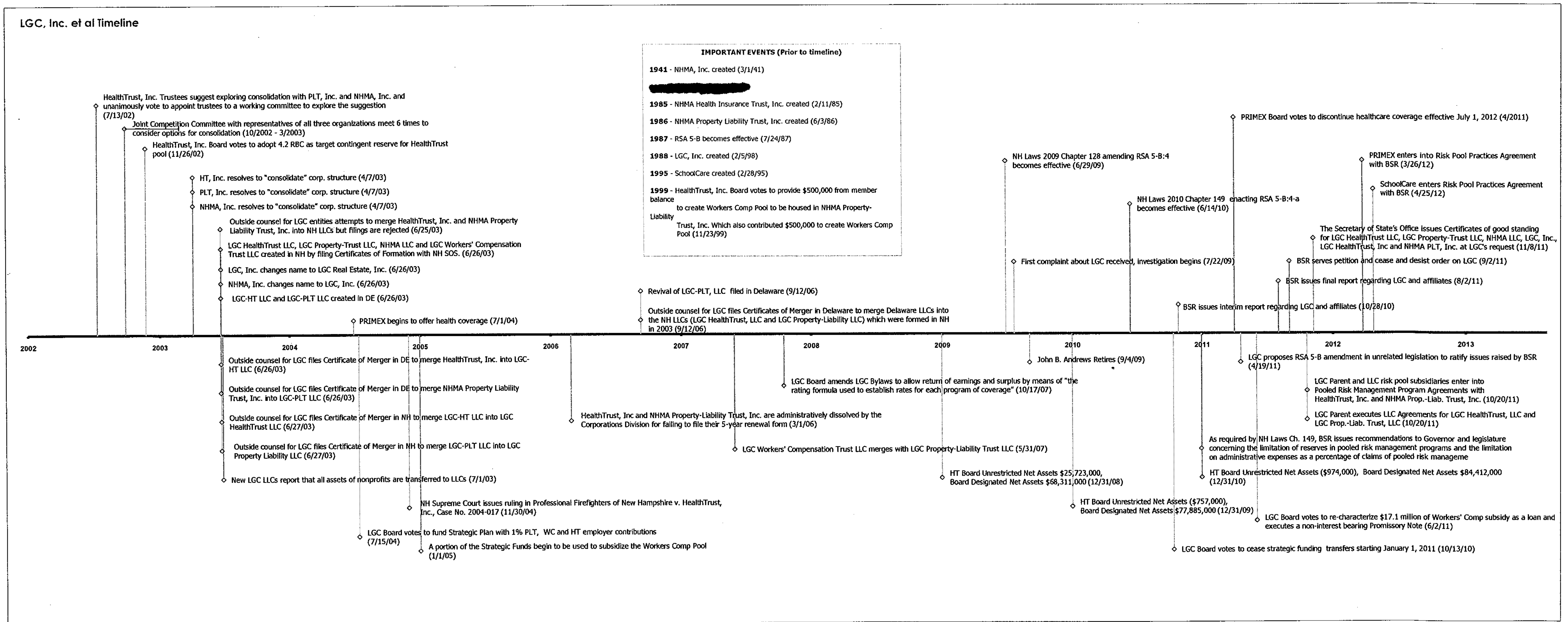
So Ordered, this 16th day of August, 2012.

Donald E. Mitchell Esq., Presiding Officer

Attachment A – Joint Exhibit 2 Timeline of Organizational Event

Service List:

cc: Jeffrey D. Spill, Esq.
Earle F. Wingate, III, Esq.
Kevin B. Moquin, Esq.
Eric Forcier, Esq.
Adrian S. Larochelle, Esq.
William C. Saturley, Esq.
Brian M. Quirk, Esq.
David I. Frydman, Esq.
Michael D. Ramsdell, Esq.
Joshua M. Pantesco, Esq.
Mark E. Howard, Esq.
Andru H. Volinsky, Esq.
Roy W. Tilsley, Jr., Esq.
Stephen M.Gordon, Esq.
Benjamin Siracusa Hillman, Esq.
Christopher G. Aslin, Esq.
Kimberly Myers, Esq



LGC, Inc. et al Timeline
IMPORTANT EVENTS (Prior to timeline)
1941 - NHMA, Inc. created (3/1/41)
1985 - NHMA Health Insurance Trust, Inc. created (2/11/85)
1986 - NHMA Property Liability Trust, Inc. created (6/3/86)
1987 - RSA 5-B becomes effective (7/24/87)
1988 - LGC, Inc. created (2/5/98)
1995 - SchoolCare created (2/28/95)
1999 - HealthTrust, Inc. Board votes to provide $500,000 from member balance to create Workers Comp Pool to be housed in NHMA Property-Liability Trust, Inc. Which also contributed $500,000 to create Workers Comp Pool (11/23/99)
2002
2003
2004
2005
2006
2007
2008
2009
2010
2011
2012
2013
HealthTrust, Inc. Trustees suggest exploring consolidation with PLT, Inc. and NHMA, Inc. and unanimously vote to appoint trustees to a working committee to explore the suggestion (7/13/02)
Joint Competition Committee with representatives of all three organizations meet 6 times to consider options for consolidation (10/2002 - 3/2003)
HealthTrust, Inc. Board votes to adopt 4.2 RBC as target contingent reserve for HealthTrust pool (11/26/02)
HT, Inc. resolves to "consolidate" corp. structure (4/7/03)
PLT, Inc. resolves to "consolidate" corp. structure (4/7/03)
NHMA, Inc. resolves to "consolidate" corp. structure (4/7/03)
Outside counsel for LGC entities attempts to merge HealthTrust, Inc. and NHMA Property Liability Trust, Inc. into NH LLCs but filings are rejected (6/25/03)
LGC HealthTrust LLC, LGC Property-Trust LLC, NHMA LLC and LGC Workers' Compensation Trust LLC created in NH by filing Certificates of Formation with NH SOS. (6/26/03)
LGC, Inc. changes name to LGC Real Estate, Inc. (6/26/03)
NHMA, Inc. changes name to LGC, Inc. (6/26/03)
LGC-HT LLC and LGC-PLT LLC created in DE (6/26/03)
PRIMEX begins to offer health coverage (7/1/04)
Outside counsel for LGC files Certificate of Merger in DE to merge HealthTrust, Inc. into LGC-HT LLC (6/26/03)
Outside counsel for LGC files Certificate of Merger in DE to merge NHMA Property Liability Trust, Inc. into LGC-PLT LLC (6/26/03)
Outside counsel for LGC files Certificate of Merger in NH to merge LGC-HT LLC into LGC HealthTrust LLC (6/27/03)
Outside counsel for LGC files Certificate of Merger in NH to merge LGC-PLT LLC into LGC Property Liability LLC (6/27/03)
New LGC LLCs report that all assets of nonprofits are transferred to LLCs (7/1/03)
NH Supreme Court issues ruling in Professional Firefighters of New Hampshire v. HealthTrust, Inc., Case No. 2004-017 (11/30/04)
LGC Board votes to fund Strategic Plan with 1% PLT, WC and HT employer contributions (7/15/04)
A portion of the Strategic Funds begin to be used to subsidize the Workers Comp Pool (1/1/05)
HealthTrust, Inc and NHMA Property-Liability Trust, Inc. are administratively dissolved by the Corporations Division for failing to file their 5-year renewal form (3/1/06)
Revival of LGC-PLT, LLC filed in Delaware (9/12/06)
Outside counsel for LGC files Certificates of Merger in Delaware to merge Delaware LLCs into the NH LLCs (LGC HealthTrust, LLC and LGC Property-Liability LLC) which were formed in NH in 2003 (9/12/06)
LGC Workers' Compensation Trust LLC merges with LGC Property-Liability Trust LLC (5/31/07)
LGC Board amends LGC Bylaws to allow return of earnings and surplus by means of "the rating formula used to establish rates for each program of coverage" (10/17/07)
HT Board Unrestricted Net Assets $25,723,000, Board Designated Net Assets $68,311,000 (12/31/08)
NH Laws 2009 Chapter 128 amending RSA 5-B:4 becomes effective (6/29/09)
First complaint about LGC received, investigation begins (7/22/09)
John B. Andrews Retires (9/4/09)
NH Laws 2010 Chapter 149 enacting RSA 5-B:4-a becomes effective (6/14/10)
HT Board Unrestricted Net Assets ($757,000), Board Designated Net Assets $77,885,000 (12/31/09)
BSR issues interim report regarding LGC and affiliates (10/28/10)
LGC Board votes to cease strategic funding transfers starting January 1, 2011 (10/13/10)
As required by NH Laws Ch. 149, BSR issues recommendations to Governor and legislature concerning the limitation of reserves in pooled risk management programs and the limitation on administrative expenses as a percentage of claims of pooled risk manageme
HT Board Unrestricted Net Assets ($974,000), Board Designated Net Assets $84,412,000 (12/31/10)
PRIMEX Board votes to discontinue healthcare coverage effective July 1, 2012 (4/2011)
LGC proposes RSA 5-B amendment in unrelated legislation to ratify issues raised by BSR (4/19/11)
LGC Board votes to re-characterize $17.1 million of Workers' Comp subsidy as a loan and executes a non-interest bearing Promissory Note (6/2/11)
BSR issues final report regarding LGC and affiliates (8/2/11)
BSR serves petition and cease and desist order on LGC (9/2/11)
LGC Parent and LLC risk pool subsidiaries enter into Pooled Risk Management Program Agreements with HealthTrust, Inc. and NHMA Prop.-Liab. Trust, Inc. (10/20/11)
LGC Parent executes LLC Agreements for LGC HealthTrust, LLC and LGC Prop.-Liab. Trust, LLC (10/20/11)
The Secretary of State's Office issues Certificates of good standing for LGC HealthTrust LLC, LGC Property-Trust LLC, NHMA LLC, LGC, Inc., LGC HealthTrust, Inc and NHMA PLT, Inc. at LGC's request (11/8/11)
PRIMEX enters into Risk Pool Practices Agreement with BSR (3/26/12)
SchoolCare enters Risk Pool Practices Agreement with BSR (4/25/12)

STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE
BUREAU OF SECURITIES REGULATION

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

RESPONDENTS' MOTION FOR RECONSIDERATION OF FINAL ORDER

Respondents Local Government Center, Inc. and affiliated entities ("LGC") hereby move for reconsideration of the Hearing Officer's Final Order of August 16, 2012 (the "Order"). In the Order, the Hearing Officer errs numerous times by imposing specific requirements on LGC that are neither expressed in nor implied by RSA 5-B.

If the New Hampshire Secretary of State (the "Secretary"), who is charged with enforcing the statute, wished to mandate that pooled risk management programs such as LGC use a particular methodology to calculate their reserves; if he wished them not to exceed a fixed maximum reserve level; and if he wished them to structure themselves and conduct their operations in particular ways that are not spelled out (or even implicit) in the statute, then he should have gone to the legislature to seek an amendment to the statute to incorporate his preferred requirements. Alternatively, the Secretary could have engaged in rulemaking to provide LGC with fair notice of what the Secretary, as regulator, required of risk pools.

Instead, the Secretary improperly appointed a former state employee and paid him over $130,000, without the Governor's or the Executive Council's approval, to create requirements that are nowhere to be found in the statutory or regulatory landscape, but that instead surfaced

for the first time in the New Hampshire Bureau of Securities Regulation's (the "Bureau" or "BSR") Staff Petition to the Secretary, or in the Amended Petition submitted to the Hearing Officer months after the commencement of this proceeding. As LGC has argued in its dispositive motions (on some of which the Hearing Officer never ruled), such a procedure does not comport with basic notions of fundamental fairness and due process. While the Hearing Officer may disagree with certain decisions LGC has made, his legal assignment was *not* to offer his own assessment of the wisdom of LGC's actions or to second-guess the business judgment of its board of directors, but to rule on whether LGC violated the requirements of RSA 5-B. LGC respectfully requests that the Hearing Officer reconsider his decision to read into RSA 5-B, and impose on LGC, requirements that may reflect the Hearing Officer's own view of how a risk pool should be run, but that simply do not exist in the statute.

LGC argues in this motion that the Hearing Officer should reconsider (1) his decision not to withdraw from this case, despite the improper pecuniary incentives created by his financial arrangement with the Secretary; (2) his disregard for the violation of LGC's right to fair notice and due process caused by the Bureau's failure to publish their novel interpretations of the requirements of RSA 5-B prior to the issuance of the Staff Petition charging LGC with statutory violations; (3) his determination that LGC's reserve-setting methods or reserve levels violated RSA 5-B; (4) his disregard of the exercise by LGC's Board of Directors of its sound business judgment in setting reserves and operating the risk pools; (5) his determination that LGC's corporate structure or conduct violated RSA 5-B; (6) his violation of the New Hampshire Constitution's rule against retrospective legislation caused by the portion of the Order purporting to undo transfers between LGC entities executed before the Secretary obtained regulatory

authority in June 2010; and (7) other specific rulings and findings the Hearing Officer made that constitute errors of law, errors of reasoning, or erroneous conclusions, as detailed below.

I. The Hearing Officer, by failing to disqualify himself, violated LGC's constitutional right to a fair and impartial hearing.

The Fourteenth Amendment to the United States Constitution provides that a State shall not "deprive any person of life, liberty, or property, without due process of law." Part I, Article 35 of the New Hampshire Constitution sets out the right to due process in more detail:

> It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit.

This essential right to an impartial decision-maker extends to quasi-judicial proceedings. *See In re Town of Bethlehem*, 154 N.H. 314, 330 (2006). Even the statute pursuant to which the Secretary of State hand-picked the Hearing Officer, without oversight, provides that:

> Each presiding officer may, at any stage of the hearing process, withdraw from a case . . . for any other reason that may interfere with the presiding officer's ability to remain impartial.

RSA 421-B:26-a,XI.

The *sine qua non* of judicial integrity and impartiality is that the judicial officer must have no pecuniary interest in the outcome of the matter. "'A *per se* rule of disqualification due to the probability of unfairness, applies when the trier has pecuniary interests in the outcome.'" *Appeal of Grimm*, 141 N.H. 719, 721 (1997) (quoting *Plaistow Bank & Trust Co. v. Webster*, 121 N.H. 751, 754 (1981)); *see also Haas v. County of San Bernardino*, 45 P.3d 280, 286 (2002) ("Of all the types of bias that can affect adjudication, pecuniary interest has long received the most unequivocal condemnation and the least forgiving scrutiny."). Schemes that create

impermissible pecuniary interests are not limited to those instances where a quasi-judicial or judicial officer's compensation is directly tied to the outcome of a case. *See Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61 (1972).

While ostensibly less formal than judicial proceedings, administrative or quasi-judicial proceedings are no less governed by the United States Constitution, the New Hampshire Constitution, and New Hampshire statutes. These sources of authority, along with a common sense analysis of the circumstances, require the Hearing Officer to reconsider his decision not to withdraw from hearing this case.[1] Here, the undisputed facts are as follows[2]:

1. The Bureau submitted the Staff Petition to the Secretary of State, who issued an order to cease and desist and show cause.

2. The Secretary of State hand-picked the Hearing Officer without creating a record of the selection process or his conversations with his choice for the position.

3. The Secretary of State asked the Hearing Officer to conduct the proceedings for free. Transcript of Administrative Hearing [hereinafter, "Tr."] 2314. The Hearing Officer, who reported that he is "not a person of significant wealth," declined to do so. Tr. 2314-2315.

4. The Hearing Officer's contract contains a provision that exempts it from the usual Governor and Executive Council review.

5. While the contract states that the Hearing Officer shall be paid an amount equivalent to his last state compensation, the actual compensation is more than 40% greater than his former state salary.

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[1] When the issue concerns the pecuniary interest of a quasi-judicial officer pursuant to a particular compensation scheme the relevant inquiry may be framed as "whether the economic realities make the design of the fee system vulnerable to a 'possible temptation' to the 'average man' as judge." *See Brown v. Vance*, 637 F.2d 272, 284 (5th Cir. 1981) ("The 'average man as judge' concept was made the heart of the test to introduce a humble Everyman, prey to the vicissitudes of life, the need for bread on the table, and for small favors from the right people.")

[2] The facts taken from the record of the hearing are cited as such. The remaining facts are matters of public record (for example, the submissions of the Staff Petition and Amended Petition) or appear in documents obtained by LGC, pursuant to RSA 91-A requests, following its discovery that the Hearing Officer's compensation was tied to the duration of the proceeding and he was renegotiating his contract with the Secretary during the final hearing. The documents were submitted to the Hearing Officer with LGC's written motion for his withdrawal.

6. When LGC inquired about the Hearing Officer's contract with the Secretary of State, it was informed it was a "flat basis" or flat fee contract, even though the Hearing Officer is paid bi-weekly based on the duration of the matter, ostensibly up to a "not to exceed" amount.

7. At least twice during these proceedings, and after LGC had inquired about the Hearing Officer's contract, he renegotiated its terms with the Secretary of State. Each time, the renegotiation was done without creating a record. Each time, the Hearing Officer continued to be paid bi-weekly based on the duration of the matter, ostensibly up to a "not to exceed" amount. LGC was not informed of the renegotiations on either occasion.

8. On March 12, 2012, LGC and the other Respondents filed motions to dismiss the Amended Petition. On April 4, 2012, the Hearing Officer denied these motions. If the Hearing Officer had granted LGC's dispositive motions, he would have been paid at least $52,500 less than he has received so far pursuant to his contract with the Secretary of State.

9. On May 11, 2012, after LGC moved for his withdrawal, the Hearing Officer placed his comments on the record, including a recitation of his recollection of certain facts and events, and denied LGC's motion. (Tr. 2313-2317). The Hearing Officer precluded LGC from inquiring about, responding to, or presenting further argument based on his comments. (Tr. 2317-2318) (Counsel: "I would like to respond to your comments on the motion that is before you." . . . Presiding Officer: "[Y]ou have nothing to react to there. I'm the hearing officer, I've have made my ruling. And I am well aware that you would like me to say something to you and accept your representation, but sir, I don't accept your representation . . . I get to say that because I'm the hearing officer - -").

10. Later in the day on May 11, 2012, LGC renewed its motions to dismiss. If the Hearing Officer had withdrawn from the case or granted LGC's dispositive motions, he would have been paid at least $35,000 less than he has received so far pursuant to his contract with the Secretary of State.

11. The Hearing Officer did not issue the Final Order until August 16, 2012, more than three (3) months after evidence was submitted. That duration virtually ensures another contract extension will be necessary.[3]

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[3] The most recent contract amendment of which LGC is aware has a "completion date" of August 31, 2012. Pursuant to RSA 421-B:26-a, XXVI, the parties have thirty days from issuance of the Final Order to submit motions for reconsideration. After his receipt of a motion for reconsideration, "[i]f the presiding officer believes further information or argument should be considered, the parties shall be provided with an appropriate notice and opportunity to be heard before any revision is made in the previous action." RSA 421-B:26-a, XXVII. Consequently, even without requesting further information or argument, by issuing the Final Order on August 16,

The Hearing Officer's erroneous conclusion that he was not required to withdraw from the matter is both an error in reasoning, and an error of law. The Hearing Officer had an impermissible pecuniary interest in the outcome of the proceeding, created by a compensation system that directly tied his compensation to the duration of the proceeding and the future good will of the Bureau. In a case that closely resembles this one, *Haas v. County of San Bernardino*, 45 P.3d 280, 283 (2002), the California Supreme Court held that "the practice of selecting temporary administrative hearing officers on an ad hoc basis and paying them according to the duration or amount of work performed" gave hearing officers an impermissible pecuniary interest in the cases before them, thus interfering with their ability to remain impartial and causing a violation of due process rights. *Id.* The California Supreme Court aptly framed the issue as follows:

> The question presented is whether a temporary administrative hearing officer has a pecuniary interest requiring disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's goodwill. We conclude the answer is yes.

Id. at 285-86.

The California Supreme Court eschewed the notion that improper pecuniary arrangements were limited to cases where the judicial officer's compensation is dependent on the outcome of a particular case. The Court correctly reasoned that when a prosecutors' office is free to select its adjudicator, it is "presumed to favor its own rational self-interest by preferring those who tend to issue favorable rulings," and the adjudicators, in turn, will "have a 'possible

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2012, it appears likely that the Hearing Officer and the Secretary of State will again renegotiate the Hearing Officer's contract while the instant motion is pending (if they have not already done so).

temptation . . . not to hold the balance nice, clear and true.'" *Id.* at 288-89. The due process violation occurs because "[t]he 'possible temptation' . . . not to be scrupulously fair, alone and in itself, offends the Constitution." *Id.* (citing *Tumey v. Ohio*, 273 U.S. 510, 532 (1972)).

Here, as a quasi-judicial officer, paid by a "per diem fee to the state," the Hearing Officer's deal with the Secretary violates due process regardless of whether there is an actual *quid pro quo* arrangement. Consistent with his referenced "per diem fee to the state," the Hearing Officer often reminded counsel that he has served as a quasi-judicial officer for the State of New Hampshire in other instances. This fact, taken together with the Hearing Officer's acknowledgement that he is not a wealthy man, present the circumstances found to violate due process because of pecuniary interest. In short, the circumstances "offer a possible temptation to the average man . . . not to hold the balance nice, clear, and true." *Tumey*, 273 U.S. at 532; *see also Haas*, 45 P.3d at 288-289 ("The 'possible temptation' . . . not to be scrupulously fair, alone and in itself, offends the Constitution.").

The impropriety and, certainly, the appearance of impropriety, were never as clear as when: (1) the Hearing Officer and the Secretary were further negotiating the contract while this contested proceeding was ongoing; and (2) by the inaccurate information given to LGC suggesting that the Hearing Officer was being compensated on a flat-fee basis.

In addition to the pecuniary incentive created by the prospect of future employment as a hearing officer, payment based on the duration of a proceeding offends due process. It is inconceivable that in a state where "[i]t is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit[,]" *Part I, Article 35 of the New Hampshire*

Constitution, a quasi-judicial officer can increase his compensation by at least $52,000 merely by denying a party's dispositive motions.

The Hearing Officer renegotiated his contract with the Bureau at least twice while the proceeding was pending, receiving a total of $100,000 more than was authorized by the original contract. The absence of notice to LGC that this was occurring, and the lack of any record of the process, highlights the disregard for due process. It is clear that such renegotiating while a proceeding is ongoing creates a situation where the Hearing Officer is "vulnerable to a 'possible temptation' to the 'average man' as judge." *See Vance*, 637 F.2d at 284. Accordingly, it was error for the Hearing Officer not to disqualify himself.

II. The Order violates LGC's right to fair notice and due process.

No language in the statute supports the reserve requirements the Hearing Officer announces in his Order. Instead, the statute leaves the setting of reserve levels to the sound business judgment of a risk pool's board of directors. *See* Section III, *infra*. While the Bureau could have acted via a formal rulemaking process if it believed the Legislature had merely omitted details related to the implementation of the statute, and then held LGC to those requirements going forward, it violates LGC's right to due process for the Hearing Officer in this adjudicative proceeding to sanction LGC for having violated standards that exist neither in the statute nor in a rule, and of whose existence LGC therefore could have no notice.

The New Hampshire Supreme Court has explained that "'promulgation of a rule pursuant to the [Administrative Procedures Act] . . . is not necessary to carry out what a statute demands on its face.'" *Appeal of Blizzard*, 163 N.H. 326, 330 (2012) (quoting *Nevins v. N.H. Dep't of Resources and Economic Dev.*, 147 N.H. 484, 487 (2002) (alterations in original). But "[i]f the

statute lacks sufficient detail on its face" to support an agency action, "then an agency must adopt rules supplying the necessary detail." *Id.* If the agency has not done so, the Court must "determine whether the result [of the agency's failure to adopt rules] was unfair by examining whether the complaining party 'suffered harm as a result of the lack of [required] rules." *Id.* (quoting *Nevins*, 147 N.H. at 488).

RSA 5-B:5,I(c) requires that pooled risk management programs "[r]eturn all earnings and surplus in excess of any amounts required for administration, claims, reserves, and purchase of excess insurance to the participating political subdivisions." The statute does not require that LGC set its reserves at fifteen percent (15%) of claims or adhere to an RBC of 3.0. The statute does not contain any reference to either of these standards, and in fact, RSA 5-B:5 provides no guidance whatsoever as to how or at what level reserves are to be set. *See Nevins*, 147 N.H. at 487 ("One purpose for requiring rules is to give persons fair warning as to what standards the agency will rely on when making a decision.") In imposing standards not included in or contemplated by RSA 5-B, and of which LGC had no notice, and in failing to grant—or even rule on—LGC's motion to dismiss, the Hearing Officer committed an error of law.[4]

Even the legislature has acknowledged that RSA 5-B:5 lacks sufficient detail to indicate what conduct is prohibited. Legislation enacted in 2010 directed the secretary of state to employ the services of an actuary and submit a report to the legislature containing specific

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[4] This is not a case where LGC failed to calculate reserves. LGC adhered to the statutory requirements by selecting a means to calculate reserves and proceeding to calculate them accordingly. As required by the statute, LGC has "[p]rovide[d] for an annual actuarial evaluation of the pooled risk management program" that meets the requirements of 5-B:5, I(f). But after years of accepting LGC's filings without objection, and with no prior notice having been given to LGC that only certain (undefined) reserve levels and methods of calculating reserves were permitted, the Bureau suddenly declared that LGC's reserves violated the statute. The statute lacks sufficient detail on its face for the Bureau to "enforce" it in this fashion without first promulgating rules to provide LGC with notice of its interpretation of what exactly LGC is required to do. *See Blizzard*, 163 N.H. at 330.

recommendations concerning the limitation of reserves in pooled risk management programs and the limitation on administrative expenses as a percentage of claims of pooled risk management programs. Ch. 149:6, Laws of 2010. The requested report was submitted, but no action has been taken by the legislature. *See Recommendations Concerning the Limitation of Reserves and the Limitation on Administrative Expenses as a Percentage of Claims of Pooled Risk Management Programs*, submitted by BSR on December 30, 2010; Tr. 732. That the legislature deemed it necessary to engage an outside actuary to submit "recommendations concerning the limitation of reserves in pooled risk management programs"—that is, the purported statutory requirement LGC is alleged to have violated in Count II—is direct and substantial evidence that the statute, in its current form, lacks sufficient detail to support the very specific requirements the Hearing Officer has imposed on LGC. The Bureau acknowledged as much in the press release it issued with the submission of its report where it "emphasized that these are recommendations and the legislature will ultimately determine how to address the issue." LGC Ex. 361.

Unlike the situation in *Blizzard*, where the appellant never argued that the failure to promulgate rules harmed her (*see* 163 N.H. at 330), and *Nevins*, where the appellants could not "explain … any specific way in which they were prejudiced as a result of the lack of guidance" (147 N.H. at 488), the Bureau's failure to promulgate regulations has caused clear and substantial harm to LGC. LGC has, for years, operated its business in reliance on its reasonable determination that it was in compliance with the terms of RSA 5-B:5, I(c), which simply requires that LGC "[r]eturn all earnings and surplus in excess of any amounts required for administration, claims, reserves, and purchase of excess insurance to the participating political subdivisions." Moreover, for all of those years, LGC filed annual reports with the Secretary, who never

complained about LGC's methods of operation.[5] Now, based on the Bureau's pronouncement that LGC violated heretofore unidentified requirements purportedly imposed by RSA 5-B, LGC has been subjected to the enormous disruption and expense caused by BSR's enforcement action against it, culminating in the issuance of the Order requiring LGC to completely restructure its operations and its finances, including the payment of more than $50 million.

Federal law is consistent with New Hampshire precedent, in that it also prohibits the Bureau from announcing new requirements for the first time in an adjudicatory proceeding, and imposing them on LGC, without having given prior notice of their existence. In the absence of rules to put LGC on notice of the particular requirements the Bureau believes should be read into the very general statutory language about reserves, the Bureau cannot create such requirements after the fact and impose them on LGC. *See General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995)("In the absence of notice—for example, where the regulation is not sufficiently clear to warn a party about what is expected of it—an agency may not deprive a party of property by imposing civil or criminal liability."). "If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express . . . . [The agency] has the responsibility to state with ascertainable certainty what is meant by the standards [it] has promulgated." *Diamond Roofing Co. v. Occupational Safety and Health Review Commission*, 528 F.2d 645, 649 (5th Cir. 1976).

Because the text of RSA 5-B:5 did not provide LGC with notice of the standards to which the Bureau has sought to hold it, and because LGC was harmed by the Bureau's failure to

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[5] Since the inception of RSA 5-B in 1987, the Secretary had the authority to "perform or cause to be performed the required audit or [actuarial] evaluation" and have the risk pool program pay the cost, if LGC failed to file an annual actuarial evaluation that complied with the statute. See RSA 5-B:5 II. However, the Secretary never exercised that authority.

promulgate rules that would have provided LGC with notice of those standards, the Bureau's failure to engage in rulemaking to supply the necessary detail violated LGC's constitutional rights to fair notice and due process. The Bureau should not be permitted to hold LGC to standards that are neither expressed nor implied in the statute, nor established via rulemaking. In so doing it has engaged in ad hoc rulemaking that neither state nor federal law permits.

III. The Hearing Officer erred in his statutory interpretation of RSA 5-B by imposing reserve requirements on LGC that are not contained in the statute.

A. LGC complied with the requirements of RSA 5-B.

RSA 5-B imposes the following specific requirements on pooled risk management programs related to reserves:

> 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, I(c)

> Provide for an annual actuarial evaluation of the pooled risk management program. **The evaluation shall assess the adequacy of contributions required to fund any such program and the reserves necessary to be maintained to meet expenses of all incurred and incurred but not reported claims and other projected needs of the plan.** The annual actuarial evaluation shall be performed by a member of the American Academy of Actuaries qualified in the coverage area being evaluated, shall be filed with the department, and shall be distributed to participants of each pooled risk management program.

RSA 5-B:5,I(f) (emphasis added).

The uncontroverted evidence at the hearing established that LGC has consistently complied with the annual requirements to file an actuarial evaluation pursuant to RSA 5-B:5,I(f). *See*, e.g., LGC Ex. 306 at 45-55 and LGC Ex. 302 at 93-126. In fact, the Bureau's own actuary, Howard Atkinson, specifically acknowledged that HealthTrust has met these requirements; he

testified that LGC's actuary, Peter Reimer, is a member of the American Academy of Actuaries (Tr. 753); that HealthTrust conducted an annual actuarial evaluation (Tr. 753); and that the evaluation assessed the adequacy of contributions required to fund the program, the reserves necessary to meet expenses of all incurred and incurred but not reported claims, and other projected needs of the plan. Tr. 753-759.

RSA 5-B also provides that pooled risk management programs must "[r]eturn 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,I(c). The statute, however, does not establish a required method for calculating reserves—based on percentage of claims, RBC, or any other method. Nor does the statute establish a maximum amount of reserves a risk pool may hold.[6] In the absence of an established statutory directive or adopted rule related to the proper method or level of reserves, New Hampshire law charges the governing board in the exercise of its sound business judgment to determine the proper level of reserves to protect its participating members from future risks. This is precisely what LGC has done.

Rather than evaluate HealthTrust's reserves based on a business judgment rule analysis, the Hearing Officer declared that the statutory language of RSA 5-B:5 requires that LGC HealthTrust's reserves must be limited to "fifteen percent (15%) of claims or an RBC 3.0 as determined by the BSR, whichever is less." Order at 76, ¶9. The Hearing Officer erred as a

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[6] The Hearing Officer acknowledges as much in his Order, stating: "The statute also does not expressly prescribe a particular method of computation to be used by a pooled risk management program to compute the amount of earnings and surplus." Order at 30.

matter of law in reading requirements into the statute that are nowhere to be found in its actual text.[7]

If—as the Hearing Officer appears to believe—the existing statute mandates a method for setting reserves and a specific level at which they must be set, passage of Chapter 149:6, Laws of 2010 would not have been necessary. The Legislature's request for guidance on the issue of reserve levels underscores the absence of any language in the statute to support the Hearing Officer's command that LGC set its reserves at the particular level he has specified.

B. The Hearing Officer erred in imposing his own judgment on the business and affairs of LGC, and ignoring the sound business judgment exercised by the Board.

In the absence of a specific statutory directive as to the proper method for calculating reserves or any specific reserve level ceiling, RSA 5-B:5 permits a risk pool's board of directors to exercise its sound business judgment in determining the proper level of reserves for its particular risk pool characteristics. Under New Hampshire law, the directors of a corporation

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[7] Reinforcing the point that RSA 5-B does not specify a maximum permitted reserve level is the fact that legislation was introduced in 2010 to require that reserves be set at ten percent (10%) of claims. Tr. at 737; House Bill 1393 (2010); LGC Ex. 253. Testifying at the Senate hearing on the proposed reserve limit in HB 1393, the Bureau's Attorney Kevin Moquin told the legislature that:

> We do support the concept of providing a specific benchmark for reserves. It doesn't seem unreasonable to us that the legislature should set a reserve level for a program the legislature authorized, and it would give us further guidance as to what the legislature considers a proper level of reserves.

HB 1393 Senate Commerce Committee Transcript at 2; LGC Ex. 253. The proposed legislation setting a specific reserve limit failed to pass. Tr. at 737; LGC Ex. 361 (BSR press release 12/30/10); HB 1393 (2010). Instead, the Legislature amended the bill and passed a law directing the Bureau to provide "recommendations concerning the limitation of reserves in pooled risk management programs and the limitation on administrative expenses as a percentage of claims of pooled risk management programs." Ch. 149:6, Laws of 2010 (emphasis added). In response, the Bureau submitted the report which studied HealthTrust only and made recommendation regarding possible reserve limits to adopt as part of RSA 5-B; its recommendations are still pending before the legislature. The Bureau's press release issued with submission of the report stated that "**The Bureau emphasized that these are recommendations and the legislature will ultimately determine how to address these issues.**" (Emphasis added) LGC Ex. 361.

must discharge their duties (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) in a manner they reasonably believe to be in the best interests of the corporation. RSA 293-A:8.30(a).

Pursuant to the business judgment rule, there is "a powerful presumption in favor of actions taken by the directors in that a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be 'attributed to any rational business purpose.'" *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993); *see also Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1373 (Del. 1995) ("The business judgment rule is a 'presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.'").

The burden is on the party challenging an exercise of business judgment—here, the Bureau—to rebut the presumption in favor of directors who have acted in good faith and with ordinary care. *McMullin v. Beran*, 765 A.2d 910, 917 (Del. 2000). The business judgment rule thus "operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation." *Cede*, 634 A.2d at 360.

The Hearing Officer failed to analyze LGC's actions under the business judgment rule. Under RSA 5-B, it falls to the Board of Directors—exercising their sound business judgment—to establish an appropriate reserve level. Tr. 323:8-13. The Bureau's own insurance industry expert, Michael Coutu, testified that "[i]t's [the Board's] prerogative to set a [reserve] level they deem prudent." Tr. 323:3-4.

As documented in LGC's Post-Hearing Brief, there was voluminous evidence at the hearing that LGC's Board exercised its sound business judgment in selecting a method for setting reserves and holding a level of reserves. *See* LGC's Post-Hearing Brief Regarding Count II ("Post-Hearing Brief") at 4-16. In his Order, the Hearing Officer does not rule to the contrary, but instead simply disregards the business judgment rule. The Hearing Officer ignores the statutory language expressly identifying, as a criterion for evaluating pooled risk management programs, whether the plan held "the reserves necessary to be maintained to meet expenses of all incurred and incurred but not reported claims and other projected needs of the plan" (RSA 5-B:5,I(f)). He fails to explain how the phrase "other projected needs of the plan" could be interpreted other than to put substantial discretion in the hands of the Board of Directors to set reserve levels pursuant to its sound business judgment. In failing to analyze whether the Board acted within its discretion in exercising its reasonable business judgment to set LGC's reserves, the Hearing Officer committed an error of law.

C. The Hearing Officer erred in ignoring the contradiction between the Bureau's interpretation of the statute in this proceeding against LGC and its agreements with PRIMEX and SchoolCare on the same issues.

Contrary to the Order, RSA 5-B does not require pooled risk management programs to use a particular method for setting reserves or to maintain the specific reserve level the Hearing Officer has announced. This is clear from the Bureau's agreements with PRIMEX and SchoolCare, the two other pooled risk management programs, which were entered into just weeks before the hearing. Those agreements—drafted by the Bureau, the entity charged with enforcing RSA 5-B by the Secretary—do not subject PRIMEX or SchoolCare to the same requirements, purportedly found in RSA 5-B, that the Hearing Officer has imposed on LGC.

Indeed, those agreements do not impose a consistent methodology or limit on the other risk pools.

Instead, the Bureau has agreed that PRIMEX's and SchoolCare's boards of directors may set reserve levels based on their "sound business judgment," LGC Ex. 334, § 3.1; BSR Ex. 65, SchoolCare Agreement, § 3.2—which is precisely what the evidence revealed the LGC Board has done. The Bureau's agreements with PRIMEX and SchoolCare expressly permit their boards to set a reserve level above RBC 3.0 based upon their sound business judgment. *See* Tr. 1600-01; LGC Ex. 334 § 3.1; SchoolCare Agreement, § 3.2. The Hearing Officer committed an error of law in reading requirements into the statute in LGC's case that are flatly inconsistent with how the Bureau has interpreted the statute in its dealings with the other New Hampshire pooled risk management programs.

D. The Hearing Officer erred in ruling that fifteen percent (15%) of claims or RBC 3.0 is a sufficient level of reserves.

There was voluminous uncontroverted evidence at the hearing, summarized in LGC's Post-Hearing Brief, to support the Board's determination that LGC's reserve levels were necessary and appropriate. The Bureau's own expert, Howard Atkinson, testified that the work of LGC's actuary in setting reserves was "reasonable … [but] very conservative." Tr. at 693. Further, while the Hearing Officer appears to mock LGC's Chairman for thinking about possible future events such as pandemic disease and terrorist attacks, *see* Order at 48, the Bureau's own expert (Mr. Atkinson) indicated in his report that "reasons why claims might exceed expected levels" include "[p]andemics" and "[a]cts of terrorism." *See* BSR Ex. 68 at 108. Given this agreement by the Bureau's own expert that the possibilities weighed by LGC's Board were,

indeed, proper considerations for an insurer to weigh, the Hearing Officer's conclusion that this indicates the Board was too conservative in setting reserves is unwarranted.

Further, the record lacks any basis for the Hearing Officer to impose a capital adequacy limit on HealthTrust of the lesser of 15% of claims or an RBC of 3.0.[8] There was no actuarial evidence provided that either of these specific levels is the proper measure of capital adequacy the plan needs to ensure the solvency of HealthTrust in the face of unexpected future losses.[9]

The decision states that the 15% of claims methodology was chosen because it is a "straightforward method." Order at 75. "Straightforward" does not equate to "required by statute" or even "appropriate." As the Hearing Officer's findings and rulings on the issue of the adequacy of LGC's reserves were unreasonable and contrary to the evidence, they must be reconsidered.

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[8] The Hearing Officer also erred in completely disregarding evidence introduced at the hearing that LGC's reserve levels and targets are in line with those maintained by like organizations in other states. *See* Order at 36-37; Tr. 324:17 (Blue Cross/Blue Shield has maintained an "RBC of 4 to 5, or in percentage speak, 400 to 500."); Tr. 776 (surplus levels have produced RBC ratios for Blue Cross/Blue Shield plans in the range of 500 to 900 percent); Tr. 325 (RBC ratios in Massachusetts are "600 to 700 percent."); Tr. 1290 (Pennsylvania looks for RBC ratios to be in the range of 5.0 to 7.0); Tr. 741-72 (RBC of 5.5 to 7.5 is appropriate for nonprofit organizations). While the Hearing Officer is no doubt correct that the programs LGC pointed to are not precisely identical to a New Hampshire pooled risk management program, that does not justify his decision to "eliminate their consideration" altogether. Order at 37. Nor does the fact that "[t]hese reports were undertaken for purposes other than this instant matter" (*id.* at 36) deprive them of evidentiary significance, as the Hearing Officer appears to believe. It was unreasonable for the Hearing Officer to disregard relevant evidence.

[9] While the PRIMEX agreement with the Secretary establishes an initial reserve limit of 3.0 RBC, that is not sufficient evidence to support a 3.0 RBC limit on HealthTrust. First, the PRIMEX agreement allows it to exceed a 3.0 RBC based on the Board's sound business judgment. Second, the limit in the PRIMEX agreement applies to non-health coverage lines of business, as PRIMEX has exited the health coverage business.

E. The Hearing Officer erred in setting a reserve level based on a percentage of the past year's claims rather than expected claims in the upcoming plan year.

The Hearing Officer limited capital reserves to the lesser of fifteen percent (15%) of claims or an RBC of 3.0 "based upon the year end audited financial statement."[10] Order at 76. Ordering a reserve limit based on the previous year's audited financial statement is an error of reasoning and shows a lack of understanding of the purpose for capital reserves.

A capital reserve is required to protect the risk pool from future unanticipated losses. That is why a risk pool, like any insurer, must establish a "target reserve level" for the upcoming year, based on the expected claim costs (rather than a number defined by past year's claims history).[11] The Bureau's own actuary acknowledged the routine use of developing "target reserve levels" for his clients, to protect a plan's solvency in the upcoming year from the risk that "the reserves at the beginning of the plan year plus the current year's premium and investment income will not be sufficient to cover the current year's claims administered expenses." BSR Ex. 68(e) at 108.

To protect the plan against such a risk, the plan must develop a reserve level based on expected future claims instead of the past year's claims history. As reserves are necessary to protect a plan from unexpected future claims it is unreasonable and an error of law to set reserves based on a prior year's claims figures.

[10] Similarly, the order requires HealthTrust to return net assets over 15% of claims as reported in its 2010 audited financial statements. Order at 76.

[11] Even the statute the Hearing Officer cites in support of his position utilizes reserves based on estimated annual claims, not the past year's incurred claims. See RSA 21-I:30-b.

F. The Hearing Officer erred in relying on RSA 21-I:30-b in support of his statutory interpretation that RSA 5-B prohibits reserves greater than fifteen percent (15%) of claims or an RBC of 3.0.

The Hearing Officer further erred in citing RSA 21-I:30-b in support of his determination that RSA 5-B somehow requires LGC's reserves to be limited to "fifteen percent (15%) of claims or an RBC 3.0 as determined by the BSR, whichever is less." Order at 76, ¶9; *see also* Order at 29. One problem with this line of reasoning is that RSA 21-I:30-b deals with a single employer self-insurance plan operated by the State of New Hampshire, which retains the coverage risks itself and has the option of tapping into the general fund if reserves prove to be insufficient. In contrast, LGC HealthTrust accepts the coverage risks of hundreds of employers and tens of thousands of individuals, and does not have the option under its contracts with its members to assess additional costs beyond the agreed-upon rates.

More importantly, RSA 21-I:30-b is inapplicable because, unlike RSA 5-B, it establishes a minimum required reserve level, not a maximum. If anything, RSA 21-I:30-b supports LGC's position that RSA 5-B does *not* mandate any particular reserve level or method of calculating reserves, as it demonstrates that when the legislature wishes to impose such requirements, it does so via express statutory language of a type missing from RSA 5-B. *See* RSA 21-I:30-b ("five percent of estimated annual claims and administrative costs of the health plan").

G. The Hearing Officer erred by interpreting RSA 5-B to require the purchase of reinsurance.

The Hearing Officer erred as a matter of law in ordering that LGC immediately purchase reinsurance. *See* Order at 75, ¶7. RSA 5-B lists reinsurance (or "excess insurance") as a cost that *may* be incurred by (not one that is required of) a pooled risk management program (*see* RSA 5-B:5,I(c)) ("*any* amounts required . . .") (emphasis added). Moreover, the programs are

specifically authorized to self-insure. *See* RSA 5-B:3,I (authorizing political subdivisions to "establish and enter into agreements for obtaining or implementing insurance by *self-insurance*; for obtaining insurance from an insurer authorized…as an admitted or surplus lines carrier;…or for obtaining insurance by any combination of the provisions of this paragraph") (emphasis added).

Further, the Hearing Officer's remedies under RSA 5-B:4-a,VII are expressly limited to imposing fines and ordering rescission, restitution, or disgorgement. In affirmatively ordering that a New Hampshire pooled risk management program must purchase re-insurance, he has misconstrued the statute and exceeded his authority as a matter of law.

H. The Hearing Officer erred in relying on HealthTrust's "longer term investment vehicles" in determining that LGC retained excess surplus in violation of RSA 5-B.

According to the Hearing Officer, LGC's placement of certain funds in "longer term" investment vehicles "is another indication of the excess earnings and surplus available and retained by the LGC, Inc. health trust and is an improper retention that violates RSA 5-B:5,I(c)." Order at 53-54. Once again, the Hearing Officer committed an error of law by ruling that LGC violated the statute based on conduct—investments with a time horizon of greater than three years—RSA 5-B does not proscribe.[12]

Moreover, the point the Hearing Officer misses is that while it might make sense to hold *claims* reserves, which exist to cover known liabilities, in instruments with maturities that correspond to the time horizon on which the liabilities are expected to come due, *capital* reserves are held to ensure the overall financial soundness of the entity assuming the risk, and thus need

[12] RSA 5-B does not contain limits on the type or duration of risk pools investments.

not be invested in instruments that line up with estimated liabilities. The Bureau's insurance industry expert conceded as much at the hearing. *See* Tr. 301-303 ("Q. Would you agree with me that there isn't a linkage—there is no linkage necessary between the amount and the investment in capital, whether it's got to be invested in securities of some specific duration, would you agree with that statement? A. As relates to the capital piece, yes.").

I. The Hearing Officer erred in requiring annual return of excess reserves only in cash, and not permitting the return in rate credits or ways that would stabilize rates.

RSA 5-B requires risk pool programs to "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,I(c). In ordering that LGC annually return excess capital in cash, instead of via rate stabilization, *see* Order at 77-78, ¶¶10-11, the Hearing Officer erred, because the statute is silent as to the method and timing by which excess capital is to be returned.[13]

Indeed, rather than requiring the return of surplus through a particular means, the statute requires the program, as part of the rate setting process, to canvass its members for the desired means by which surplus is returned. Two public hearings must be held "to solicit comments from members regarding the return of surplus…." *See* RSA 5-B:5 I,(g).

The Board sought guidance from both its outside corporate counsel and its actuary before acceding to its members' wishes for rate stabilization instead of the vicissitudes of annual

[13] The Hearing Officer's presumption that rate stabilization is prohibited is also at odds with the evidence at the hearing, which revealed that when RSA 5-B was enacted, the purpose of pooled risk management programs was in fact to stabilize rates over time. S*ee generally* LGC Ex. 324 at 4, NH School Board's Insurance Trust RSA 5-B annual filing, 1987-1988 financial summary ("trust fund balance to be utilized for rate stabilization."); Testimony of John Andrews, Tr. Vol. 3 at 542, 590; SchoolCare Articles of Incorporation ("Purpose of stabilizing future benefit costs") LGC Ex. 315 at 39.

occurrences in rates. LGC's corporate counsel analyzed RSA 5-B and its legislative history, and opined in writing concerning the proper method of returning surplus/member balance; he testified that RSA 5-B is silent as to how and when surplus is to be returned, and that returning surplus via rate credits over multiple years was consistent with RSA 5-B, and risk pool practices around the country. Tr. 1616-1620; LGC Ex. 381; Tr. 2379. Based on the advice of its actuary, the Board adopted a policy of returning surplus in rate credits over a three-year period.

The Bureau's own actuary's report supports LGC's method of returning surplus. Tr. 793; *see also* Segal Report (commissioned by the Bureau), LGC Ex. 360 at 9 ("Prudent underwriting would call for trying to achieve the reduction over multiple (2-3) years during the rate revisit process."). Accordingly, the Hearing Officer erred in ordering a particular method to return capital where the statute directs programs to solicit the desired means from its members.

J. The Hearing Officer erred regarding the return of reserves of Property-Liability Trust.

The Hearing Officer's Order requires the Bureau and LGC to confer and establish a plan to return $3.1 million from Property-Liability Trust to its members, because "[t]he parties did not propose a means of calculating the required net assets for the Local Government Center's other [than HealthTrust] Risk pool management programs," and because LGC "also did not attest to the use of an actuarially based means of determining the required net assets for this risk pool management program." Order at 77. [14]

The Hearing Officer erred, as Property-Liability Trust submitted evidence showing an actuarial basis for calculating its required net assets. *See* LGC Ex. 305 at 11-12, 34; *see also*,

[14] The $3.1 million ordered to be repaid was held in a net asset fund designated for rate stabilization. LGC Ex. 169, 2010 Property-Liability Trust Financial Statement, Note 10. As explained in the immediately preceding section of this motion, such designated accounts are permissible.

LGC Ex. 302 at 93-126, actuarial evaluation and financial statements establishing the PLT reserve level at a 90% confidence level. The Hearing Officer improperly shifted the burden onto LGC to prove that its method of calculating net assets was proper and consistent with the requirements of RSA 5-B. Thus, it was clear error and warrants reconsideration.

K. The Hearing Officer erred in ruling that LGC improperly exceeded its RBC targets.

The Hearing Officer ruled that "setting a 'target figure' does not appear anywhere within the statute, as a 'target' is not a component of the standards of RSA 5-B:5,I(c)." Order at 56-57. He went on to rule that, by exceeding its target level, LGC acted improperly. *Id.* The Hearing Officer erred in determining that the use of a target reserve level is inappropriate for RSA 5-B entities and that LGC acted improperly by exceeding its target. *Id*. His rulings in this regard are unreasonable, and show a lack of understanding about the purpose and process associated with reserve setting.[15]

The nature of a "target reserve level" is that it will be exceeded in some years. As Peter Curro explained at the Hearing, "the concept of RBC" is "a moving target," one that fluctuates with membership levels and claims experience. Tr. 2366-67; *see also* Tr. 1286-8 (Riemer testimony). To expect an insurance provider to hit its RBC target with perfect accuracy every year is to misunderstand the nature of insurance. The Hearing Officer thus

[15] As previously discussed, capital reserve is needed to protect the risk pool from future unanticipated losses. *See* Section III, E, *supra*. That is why a risk pool, like any insurer, must predict and fund a "target reserve level" to protect itself from these future events. Establishing the proper level of reserves for the upcoming plan year necessitates establishing the reserve level based on the risk, and building any needed increases in those reserves into the projected rates for that upcoming year. Even the Bureau's own actuary acknowledges the routine use of developing "target reserve levels" for its clients, to protect a plan's solvency in the upcoming year from the risk that "the reserves at the beginning of the plan year plus the current year's premium and investment income will not be sufficient to cover the current year's claims administered expenses." BSR Ex. 68(e) at 108.

erred as a matter of law and reasoning in ruling that LGC "ignores its own target." *See* Order at 57.

L. The Hearing Officer erred in ruling that amounts invested in capital assets necessary for the operation of the risk pool are excess reserves which must be returned.

In ordering the return of $33.2 million from HealthTrust as excess reserves, the Hearing Officer included $2,237,390 "invested in capital assets."[16] LGC Ex. 159. Such capital assets include computer systems, furniture, and other equipment needed for the operation of HealthTrust. These capital assets are necessary for the ongoing operation of the risk pool program. In declaring these capital assets "excess surplus" to be returned, the Hearing Officer committed an error of law.

IV. The Hearing Officer erred as a matter of law in holding that LGC's corporate structure violated RSA 5-B.

A. The Hearing Officer erred in ruling that RSA 5-B prohibits a single board of directors and a single set of bylaws from governing multiple risk pools.

It is well understood that "LGC is a single organization that owns and manages" multiple subsidiaries that "operate pooled risk management programs under chapter 5-B," and that "LGC manages its subsidiaries through a single board of directors . . . ." *Professional Firefighters of New Hampshire v. Local Government Center, Inc.*, 159 N.H. 699, 700 (2010). The Hearing Officer has now ordered LGC to "organize its two pooled management programs into a form that provides each program with an independent board and its own set of written bylaws." Order at 73, ¶1. In so doing, the Hearing Officer committed an error of law, as nothing in the statute

[16] The $33.2 million ordered by the Hearing Officer is calculated by subtracting 15% of claims from the total net asset amount of $86,781,781 reported in the 2010 audited financial statement. However, this total net asset amount includes $2,237,390 invested in capital assets. See LGC Ex. 159, HealthTrust's 2010 Financial Statement, at 19, "Liabilities and Net Assets."

requires that LGC's risk pools be governed by independent boards of directors or their own independent sets of bylaws.

RSA 5-B provides that "[e]ach pooled risk management program shall . . . [b]e governed by a board . . . ." RSA 5-B:5,I. This is a clear, unambiguous requirement with which LGC has complied. It is undisputed that LGC's pooled risk management program is "governed by a board," as the statute requires. Nowhere in the statute does it say that two or more risk pools cannot be governed by a single board.

The statute further requires that "[e]ach pooled risk management program shall . . . (e) [b]e governed by written bylaws which shall detail the terms of eligibility for participation by political subdivisions, the governance of the program and other matters necessary to the program's operation." RSA 5-B:5,I. It is undisputed that LGC's pooled risk management programs are "governed by written bylaws," as the statute requires. The statute does not say that two or more risk pools may not share a set of bylaws. *See* Dispositive Motion regarding Count I, dated March 12, 2012; Post-Hearing Brief dated June 4, 2012. If the legislature had intended to require that each risk pool have its own independent board and its own bylaws, it would have said so. It is error for the Hearing Officer to impose these requirements.

The Hearing Officer's rationale for his decision regarding what is permitted under the statute highlights his errors in reasoning and of law. After comparing LGC's current corporate structure to that which existed in 1987, Order at 8-11, the Hearing Officer regards the earlier organizational structure as if it were adopted by the legislature in the statute as the only permissible governance structure. ("Therefore, the legislature knew of the existing structure of the health trust and the property liability trust programs and affirmed them and the other

programs, unrelated to LGC, Inc. (then NHMA, Inc.) in existence at the time of passage as each met the requirements of RSA 5-B:5, I (b) and (e)." Order at 20.) However, the statute did not enact such requirements.

While the Hearing Officer recognizes that there were other then-existing risk pools affirmed by the passage of RSA 5-B (Order at 9, FN 4), he ignores the uncontroverted evidence that these other risk pools, which were likewise affirmed by the adoption of RSA 5-B, had organizational structures that are inconsistent with his interpretation of the statute. For example, the NH School Boards Insurance Trust had one board and one set of bylaws that governed three separate risk pools with different sets of members in each. *See* LGC Ex.323 (NHSBIT's Annual RSA 5-B filing covering 1987). The legislature was aware of this alternative risk pool structure when adopting RSA 5-B, as the New Hampshire School Board's Insurance Trust's executive director testified to the legislative committee considering the bill and informed them that it was a single entity that operated multiple risk pool programs. *See* LGC Ex.232. Consequently, interpreting RSA 5-B to require LGC's risk pools to maintain their 1987 corporate structure is unreasonable and not supported by the statute, the legislative history, or the record.

B. The Hearing Officer erred in ruling that two separate Boards are required to prevent the dilution of the powers of the respective members of each pool.

The Hearing Officer erroneously ruled that:

> By abolishing each program's respective board and substituting the LGC, Inc. board of directors, the political subdivision members of each pooled risk management program were deprived of the governance previously maintained for their benefit. **There can now be reasonable dispute that such an action dilutes the power of the respective members of each program**, the health trust and the property liability trust, to control operation and expenditures.

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Order at 19 (emphasis added).

Contrary to the Hearing Officer's implication, the statute does not require that these board members be representatives of the political subdivisions that specifically participate in a particular risk pool program. While the LGC Board of Directors is elected by a vote of LGC's members at the annual meeting, *see* LGC Ex. 223, LGC Bylaws § 3.8, RSA 5-B does not require an election by the participating risk pool members or that the board members be representatives of the participating risk pool members. This interpretation is consistent with the Hearing Officer's finding that, pursuant to RSA 5-B:1 "the beneficiaries of this statute are intended to be our state's political subdivisions as representative of the public benefit." Order at 19. [17]

Finding there is a "reasonable dispute" that an action dilutes the power of respective members is not finding that any action actually violates a statutory requirement, and, consequently, is an error of law and reasoning.

C. The Hearing Officer erred as a matter of law in ruling that the LGC, Inc. Board of Directors took "complete control and dominion, *by fiat*," over what had been separately governed RSA 5-B risk pools.

In the Hearing Officer's formulation, the LGC Board of Directors "install[ed] itself as parent" over its subsidiary risk pool entities in a maneuver that (according to the Hearing Officer) amounted to "tak[ing] away the independence" of the risk pools. Order at 21; *see also* Order at 15 (the LGC Board assumed control over the risk pools "*by fiat*"). In fact, the merger

[17] The Hearing Officer also erred in finding that HealthTrust and Property-Liability Trust's respective risk pool participating members' control over operations and expenditures were diluted by transitioning in 2003 to a single board of directors. No evidence of such dilution was submitted at the hearing. Rather, all the evidence shows that, prior to the passage of RSA 5-B in 1987, through the 2003 reorganization, the participating risk pool members of HealthTrust, Inc. and NHMA Property Liability Inc. did not appoint or elect the Board of Directors of these respective entities. Instead, the Bylaws for both HealthTrust, Inc. and for NHMA Property-Liability Trust Inc. provided that their respective Boards of Trustees were appointed by the NHMA Executive Committee (the predecessor name for the LGC, Inc. Board of Directors) and could be removed at any time and for any reason by the same. *See* LGC Ex. 220, §§ 3.3 and 3.8.; and Ex. 221, §§ 4.3 and 4.7. Thus, it is unreasonable to conclude that a dilution of control occurred or that the statute requires separate boards to protect against such dilution.

was accomplished pursuant to votes taken by the then-separate boards of the Health Trust and Property-Liability Trust entities. *See* LGC Ex. 45, 54. The joint resolution separately adopted by each of the risk pool boards specifically acknowledges as much:

> That the respective Boards of Trustees or Executive Committee, as the case may be, of the New Hampshire Municipal Association, Inc., the New Hampshire Municipal Association Property Liability Trust, Inc. and HealthTrust, Inc. (together the "Companies"), each separately and jointly, deem it advisable and generally to the welfare and advantage of each Company and all of their respective members and the employees of members, that the Companies be consolidated into an organization represented by a single board of trustees.

LGC Ex. 54, Joint Resolution.

As there is no evidence that LGC installed itself over the risk pools, took away the risk pool's independence, or assumed control of the risk pools *by fiat,* such a finding by the Hearing Officer is unreasonable and should be reconsidered.[18]

V. The Hearing Officer erred in barring LGC from setting its own membership requirements.

The Hearing Officer erred as a matter of law in barring LGC from requiring membership and/or the payment of dues. *See* Order at 74, ¶4.[19] Although this issue was raised in the

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[18] The Hearing Officer also erred in ruling LGC's members are not the intended beneficiaries under RSA 5-B. Order at 19. The express purpose of the statute is to "provide for the establishment of pooled risk management programs and to affirm the status of such programs established for the benefit of political subdivisions of the state." RSA 5-B:1. Thus, the Hearing Officer erroneously concluded that the members of LGC are not intended to be the beneficiaries of RSA 5-B. Furthermore, this error is apparent throughout the decision. The Hearing Officer consistently characterizes LGC as if it were separate from the political subdivisions that were intended beneficiaries under 5-B, and that LGC's actions were foisted upon the political subdivisions. For example, the Hearing Officer differentiates the needs of the member political subdivisions envisioned under the statute and "the needs of a controlling third party conglomerate." Order at 18.
In contrast with the Hearing Officer's erroneous conclusion, the political subdivisions that are the members of LGC voluntarily participate in the risk pools and elect the Board of Directors at the annual meeting (LGC Ex. 222, § 3.8). The LGC Board, in turn, represents the members and governs the organization in the best interest of the members who elected them. In fact, to insure broad representation of the different types of political subdivisions in the state, the LGC bylaws divide the seats on the board so that the Board of Directors is comprised of twelve (12) Municipal Public Officials, twelve (12) School Public Officials, six (6) Employee Officials and one (1) County Public Official. (LGC Ex. 222, § 6.1). The Directors are expressly charged with the duty to "set policy, oversee and administer LGC, NHMA, HealthTrust, PLT, and LGC Real Estate." (LGC Ex. 222, § 8.1).

Bureau's original petition, it was dropped from the Amended Petition. Therefore, the Hearing Officer has ruled on an issue which was not presented or argued by the Bureau in the Amended Petition or at the hearing, and in so doing, he made an error of law, and violated LGC's state and federal constitutional rights to due process.[20]

Even if the Bureau had raised this issue, RSA 5-B does not prohibit pooled risk management entities from setting requirements for members. The statute describes the voluntary participants in a pooled risk management program as "members of [an] association," RSA 5-B:3, I, and declares that a pooled risk management program shall "be governed by written bylaws which shall detail the terms of eligibility." RSA 5-B:5,I(e).

The statute specifically permits LGC's membership requirements.[21] In ruling as he did, the Hearing Officer committed an error of law.

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[19] The Hearing Officer further erred as a matter of law in prohibiting LCG from charging its risk pool members for services not specifically identified and approved by RSA 5-B. Order at 74, ¶4. RSA 5-B permits pooled risk management programs to engage in a wide array of administrative and risk management services that are expressly not intended to be limited by those specifically identified in the statute. *See* e.g. RSA 5-B:2 IV ("the provision of loss prevention services including, but not limited to…")

[20] The Hearing Officer's Order prohibiting LGC's Risk Pools from requiring membership in another organization also contradicts his own findings and rulings in the decision. The Hearing Officer lists "*mandatory membership in another of its entities, the NHMA, LLC*" as being one of the numerous other administrative practices that are maintained by LGC… *that may not directly violate the statutory provisions addressed by this decision* but should, in light of this decision and accompanying order, be considered in any discussions regarding changes in governance and financial management." Order at 70 (emphasis added). In spite of finding that this practice may not directly violate the statute, the Hearing Officer nevertheless prohibits LGC from continuing the practice.

[21] In fact, when the statute was enacted in 1987 and affirmed the then-existing risk pools, several pooled risk management programs had membership requirements. New Hampshire School Board Insurance Trust ("NHSBIT") required that members also be New Hampshire School Board Association members, and PLT, Inc. required membership in the New Hampshire Municipal Association. *See* LGC Ex. 323, NHSBIT 1987 Bylaws at 7; LGC Ex. 221, PLT, Inc. Bylaws § 2.5.3).

VI. The Hearing Officer erred as a matter of law in ruling that strategic support for the Workers' Compensation program violated RSA 5-B.

A. The statute permits a risk management program to financially support a new coverage line.

RSA 5-B:3,I provides that:

> To accomplish the purposes of this chapter, 2 or more political subdivisions may form an association under the laws of this state or affirm an existing association so formed to develop and administer a risk management program having as its purposes reducing the risk of its members; safety engineering; distributing, sharing, and pooling risks; acquiring insurance, excess loss insurance, or reinsurance; and processing, paying and defending claims against the members of such association.

(Emphasis added.)

The separate Boards of HealthTrust and Property-Liability Trust established exactly such a risk management program in 1999 when they jointly created a workers' compensation risk pool. In doing so, they determined that it would be in the best interests of their respective members to establish and financially support such a pool. The Boards reasonably believed that offering and providing integrated health benefits (including workers' compensation coverage and accompanying health management) to employees of the political subdivisions would result in reduced losses and long-term cost savings to each of the three risk pools. LGC Ex. 2 – 6, Minutes of Board Meetings from 1999.

After the reorganization of the entities into its current structure, the LGC Board also found that it would be in the best interest of its members to continue such strategic support as part of its risk management program. *See* LGC Ex. 67 and Ex. 68 (Minutes of Board Meetings from 2004).

The Board developed a strategy, adopted in 2004, which was a long-term vision of integrated risk management and health management for employees. Through a combination of Workers' Compensation programs, short and long-term disability benefits, and health benefits, LGC's members (counties, cities, towns, school districts, school administrative units) essentially are financially responsible for the total health of the people they employ and their families. While traditional commercial insurance products are often segregated, LGC recognized that it was in the unique position to help its members take an integrated approach to the funding, claims management, and risk management related to total employee health.

For example, the Board concluded that training on proper lifting techniques or safe driving which might result in the direct reduction of Workers' Compensation claims also will help people avoid back injuries and car accidents off the job, thereby reducing health and disability claims and lost work. In sum, LGC envisioned a strong, viable Workers' Compensation program to be an integral complement to the HealthTrust coverage, with a resulting benefit to the health and welfare of employees and their families and to the finances of LGC members and their taxpayers. *See* LGC Ex. 425.

The Hearing Officer committed an error of law in ruling that the strategic support to the workers compensation pool violated RSA 5-B.

B. The Hearing Officer erred in overruling the Board's business judgment.

RSA 5-B:5 permits a risk pool's board of directors to exercise its sound business judgment in determining the specific actions to take to reduce long-term costs and risks. As previously discussed, the directors of a corporation must discharge their duties (1) in good faith; (2) with the care an ordinarily prudent person in a like position would exercise under similar

circumstances; and (3) in a manner they reasonably believe to be in the best interests of the corporation. RSA 293-A:8.30(a); *see* Section III, B, *supra*.

As explained in LGC's Post-Hearing Brief, the evidence at the Hearing established that LGC's Board exercised its sound business judgment to determine that strategic support for the workers' compensation program was in the best interests of all of its members, including the members of HealthTrust. *See* LGC Post-Hearing Brief at 20-23. Moreover, the strategic support for the workers' compensation program started in 2000, when the two risk pools in question each had its own independent board—which establishes that the initiative was *not* something that was foisted upon the HealthTrust pool by its corporate parent. For these reasons, the Hearing Officer erred as a matter of law in ruling that the strategic support for the workers' compensation program was improper. *See* Order at 78, ¶13.

C. The Hearing Officer erred in ordering that the Property-Liability Risk Pool is responsible to reimburse monies contributed by the HealthTrust pool to support the Workers' Compensation pool.

The Hearing Officer erred in ordering that "the Local Government Center Property Liability Trust, LLC, however it may be organized in the future, shall re-pay the $17.1 million subsidy to the Local Government Center Health Trust risk pool management program." Order at 78. This is an unjust and unreasonable liability being placed on the Property-Liability program.

If the Workers' Compensation strategic support is indeed an impermissible subsidy, any order to repay the subsidy should be by the Workers Compensation program. To shift that responsibility to the Property-Liability coverage program is error.[22]

[22] The note executed by the LGC board for the repayment of $17.1 million to HealthTrust specifically limits this obligation to the workers' compensation program. *See* LGC Ex. 279. The Hearing Officer implies that the note is unreasonable because it is interest-free, without a date certain for repayment, and is to be paid out of surplus

D. **The Hearing Officer erred as a matter of law in holding that he could undo transfers executed before the Bureau obtained regulatory authority in June 2010.**

Should LGC's strategic support for its workers' compensation program somehow violate RSA 5-B, the Hearing Officer cannot legally undo transfers executed before the Bureau obtained its regulatory authority over LGC.[23] The Hearing Officer committed an error of law in ordering that "Local Government Center Property Liability Trust, LLC, . . . shall re-pay the $17.1 million subsidy to the Local Government Center Health Trust risk pool management program" (Order at 78, ¶13), because application of the new statutory enforcement provision to retroactively invalidate transfers that were made prior to the Bureau having the power "to exercise any rulemaking, regulatory or enforcement authority over any pooled risk management program" is a retroactive application of the new enforcement provision, in violation of Part I, Article 23 of the New Hampshire Constitution.

The Hearing Officer found that, of the money contributed by HealthTrust, all but $3.8 million was transferred prior to calendar year 2010. Order at 41. However, the Hearing Officer did not make any ruling as to how much of this $3.8 million was transferred after the Secretary of State was provided his regulatory powers in June of 2010. Furthermore, the Hearing Officer

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funds. In contrast, the Board found that to be reasonable because the source of funds was similarly out of net capital, not operating revenue, the funds were provided over many years, and repayment should follow suit. The Board likewise found that since the transfers were not initially meant to be a loan, but an investment into lowering the long-term costs for each of the pools, while reclassifying the transfer to a loan (in order to respond to member requests), it was reasonable not to charge interest on the repayment. *See* LGC Ex. 281. The Board has the authority to enter such notes pursuant to RSA 5-B:6,II and to the extent the Hearing Officer ruled that the Note was unreasonable it was an error of law in not applying the business judgment rule to the execution of the Note.

[23] On June 14, 2010, RSA 5-B was amended to give the Secretary of State "the power to investigate pooled risk management programs, issue cease and desist orders, initiate adjudicatory proceedings, impose administrative fines, and order rescission, restitution, or disgorgement." (Amended Petition ¶22.) Until 2009, RSA 5-B:4 had expressly provided that "[n]othing contained in this chapter shall be construed as enabling the department to exercise any rulemaking, regulatory or enforcement authority over any pooled risk management program formed or affirmed in accordance with this chapter."

found that "the exact amount of these funds directed to subsidize the workers' compensation program from the health trust through December 31, 2010 are difficult to ferret out from the state of the financial statements entered into evidence." Order at 41.[24] Thus, an undetermined portion of the ordered $17.1 million, but no more than $3.8 million, was transferred after the change in the law took effect.

As applied by the Hearing Officer, RSA 5-B:4-a affects substantive rights and liabilities, as it would reverse the transfer of millions of dollars that had been lawfully in the possession of the Workers' Compensation pool, and expended by that pool, prior to the Secretary having any regulatory or enforcement authority pursuant to RSA 5-B:4-a. There can be no doubt that a requirement that millions of dollars be transferred from Property-Liability Trust to HealthTrust "enlarge[s] or diminish[es] the parties' rights and obligations" of LGC and its risk pools. *Workplace Systems*, 143 N.H. 322, 324 (1999). Because this portion of the Order applies RSA 5-B:4-a in a constitutionally impermissible manner, the Hearing Officer's Order on this issue should be reconsidered.

VII. The Hearing Officer erred in ruling that payment of certain administrative expenses violated RSA 5-B.

The Hearing Officer erred in ruling that LGC violated RSA 5-B by establishing and funding an employee retirement plan, and in executing an employment contract with its former executive director which contained a post-employment non-compete provision.

[24] As an illustration, the amount of funds to be repaid would have to be reduced by the value of the corresponding benefit derived by the political subdivisions participating in HealthTrust who were also workers' compensation risk pool participants at the time any transfer was made.

RSA 5-B:5,I(c) expressly permits the use of funds for the "administration" of the risk pools.[25] The statute also authorizes that these programs, "whether or not a body corporate, may sue or be sued; make contracts; hold and dispose of real property; and borrow money, contract debts, and pledge assets in its name." RSA 5-B:6,II. Thus, programs under RSA 5-B have broad authority to expend funds to administer the complex and multifaceted operations of a Pooled Risk Management Program.

Notwithstanding these statutory provisions, the Hearing Officer ruled that certain specific administrative expenditures violated the statute, specifically the establishment and funding of an employee defined benefit plan, and payments under a non-compete/consulting contract with the former executive director. Order at 43-44. This is directly contrary to the statutory provisions permitting expenditures to run a risk pool.[26] Accordingly, the Hearing Officer erred as a matter of law in ruling that LGC's expenses violated RSA 5-B:5,I(c).

VIII. The Hearing Officer erred in ruling that real estate transfers violated RSA 5-B.

The Hearing Officer ruled that the 2003 real estate transfers among the LGC entities violated RSA 5-B. *See* Order at 79, ¶15. The Order, however, does not specify a section of the

[25] While administration is undefined, the statute expressly authorizes RSA 5-B programs to "administer a risk management program having as its purposes reducing the risk of its members; safety engineering; distributing, sharing, and pooling risks; acquiring insurance, excess loss insurance, or reinsurance; and processing, paying and defending claims against the members of such association." RSA 5-B:3 I. "Risk management" is further defined as "the defense of claims and indemnification for losses arising out of the ownership, maintenance, and operation of real or personal property and the acts or omissions of officials, employees, and agents; the provision of loss prevention services including, but not limited to, inspections of property and the training of personnel; and the investigation, evaluation, and settlement of claims by and against political subdivisions." RSA 5-B:2 IV.

[26] In assessing the overall administrative costs of LGC's program, the Hearing Officer found that the BSR expert witness "conceded that the LGC, Inc. reporting of the cost of administration at 7.7% of claims was reasonable." Order at 46. The Hearing Officer concluded "that no further discussion in this decision is attributed to such other administrative costs or the extent such were necessary to the operation of the pooled risk management program entities, particularly the health trust." Order at 47. This finding is directly contrary to his ruling that certain other administrative expenses violate RSA 5-B.

statute the real estate transfers violated, because it cannot. To the contrary, RSA 5-B:6,II, provides that "any such program operated under this chapter, whether or not a body corporate, may … hold and dispose of real property."

Administration of a pooled risk management program, like that of any business which has a physical location, requires a real property location to base its operations. LGC is no different. As LGC's ownership of LGC Real Estate, Inc. is expressly permitted by RSA 5-B:6,II, the Hearing Officer's ruling that the real estate transfers somehow violated RSA 5-B is erroneous.

The ruling that the transfer was without compensation is in error. Order at 41-2. The risk pools only pay their proportional operating costs for the building. *See* e.g. LGC Ex. 161 at 7; Tr. Vol. 9 at 2296; Tr. Vol. 7 at 1530-1. The uncontroverted testimony established – indeed, the parties jointly stipulated – that the "rent" payments charged to the risk pools are substantially below market rates. *Id.* *See*, also, Joint Ex. 3.

The Bylaws specifically note that upon dissolution, assets held by LGC. Inc. shall be liquidated and the proceeds shall be "distributed equitably to the Members in accordance with their participation in NHMA and/or the Trusts from which assets to be distributed are generated." LGC Ex. 222, Section 10.1. Thus, the value of the real estate will revert to HealthTrust and Property-Liability Trust, should the use of the building to house the operations ever cease to be needed. Nothing in RSA 5-B prohibits this ownership arrangement.

Moreover, all of the real estate transfers occurred prior to the Bureau obtaining regulatory authority on June 14, 2010. Accordingly, as set forth above in Section VI, D, *supra*, the Hearing Officer's Order invalidating the transfers is prohibited as a retrospective law.

IX. The Hearing Officer erred in ordering LGC, which prevailed on three of the five counts of the Amended Petition, to pay all of the Bureau's costs.

The Order requires LGC to pay "the costs of the investigation in this matter, and all related proceedings," pursuant to RSA 5-B:4-a,V, which authorizes the shifting of costs "upon the secretary of state's prevailing at hearing . . . ." Order at 80, ¶18. In this case, however, the Bureau prevailed on just two of the five counts, and the Bureau effectively withdrew substantial portions of the original and the Amended Petition against LGC. Any award of costs against LGC should therefore be reduced to reflect the fact that LGC prevailed on the majority of the Bureau's claims.

X. The Hearing Officer Exceeded His Authority and Erred as a Matter of Law in the Additional Relief that He Ordered.

RSA 5-B:4-a provides the following specified set of limited remedies that may be ordered in a proceeding enforcing RSA 5-B: an order to cease and desist, fines, and the following identified forms of relief: rescission, restitution, or disgorgement. A hearing officer lacks broad equity powers, and is limited to the specific authority granted by the statute.

Accordingly, the Hearing Officer erred as a matter of law in ordering the following relief:

1) Enabling the Bureau to "impose a higher limit or different methodology for calculating required net assets" on LGC HealthTrust. Order at 77, paragraph 10.

2) Providing the Bureau the authority to pre-approve loan terms before LGC Property-Liability Trust can borrow funds from a third party. Order at 78, paragraph 13.

3) Authorizing the Bureau to pre-approve the generally accepted actuarial analysis LGC Property-Liability Trust wishes to use to determine its required net assets in the future. Order at 78, paragraph 12.

4) Penalizing LGC's risk pools with forfeiture of the statutory exemption from the State's insurance laws, and from state taxation, granted pursuant to RSA 5-B:6. Order at 73, paragraph 2.

5) Ordering, without any statutory basis, how the management of LGC Real Estate, Inc. must be structured. Order at 79, paragraph 15.

XI. Conclusion.

For the foregoing reasons, after the Hearing Officer's reconsideration, the Final Order should be vacated.

Respectfully submitted,
LOCAL GOVERNMENT CENTER, INC., *et al*

By Their Attorneys:

Dated: September 14, 2012

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CERTIFICATE OF SERVICE

I certify that on the 14th day of September, 2012, I filed two printed copies with the Office of the Secretary of State, and forwarded copies of this pleading *via* e-mail to all counsel of record.

______/s/ William C. Saturley__________

STATE OF NEW HAMPSHIRE

DEPARTMENT OF STATE

IN THE MATTER OF:	
Local Government Center, Inc.; Local 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; Paula Adriance; John P. Bohenko; and John Andrews	Case No.: 2011000036
RESPONDENTS	

ORDER DENYING MOTIONS FOR RECONSIDERATION

1. On August 16, 2012 a final order was issued by the undersigned presiding hearing officer in the above captioned matter.

2. On September 14, 2012 the Respondents Local Government Center, Inc. and affiliated entities ("LGC") filed a motion for reconsideration of that final order.

3. On September 14, 2012 the Petitioner Bureau of Securities Regulation ("BSR") filed a motion for reconsideration of that final order.

4. The undersigned presiding officer reviewed the contents of both motions and any accompanying attachments to the motions.

5. The undersigned presiding officer reviewed the contents of the final decision issued on August 16, 2012.

6. Upon review, it is determined that a typographical error appears on page 19, line 6 of the final order to the following extent: the sentence as printed reads, " There can be now reasonable dispute that such an action dilutes the power of the respective members of each program, the health trust and the property liability trust, to control operation and expenditures." (emphasis added). Said text was intended to appear as "be no" instead of "be now." In full, the corrected sentence shall read, "There can *be no* reasonable dispute that such an action dilutes the power of the respective members of each program, the health trust and the property liability trust, to control operation and expenditures." (emphasis added).

Pursuant to RSA 541: 5 the undersigned hereby denies the motions for reconsideration as filed by the parties for reasons contained in previous orders and in the final decision. In addition, a substitute page 19 of the final decision reflecting the typographical correction as cited in Paragraph #6, above, shall issue forthwith.

So Ordered this 24th day of September, 2012.

Donald E. Mitchell, Esq.
Presiding Officer

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Amendment V. Criminal actions — Provisions concerning — Due process of law and just compensation.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

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§ 1. Citizenship — Due process of law — Equal protection.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof; are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

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Article 15th. [Right of Accused.]

No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel. No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must be established. Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.

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Article 23d. [Retrospective Laws Prohibited.]

Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses.

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Article 35th. [The Judiciary; Tenure of Office, etc.]

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people, that the judges of the supreme judicial court should hold their offices so long as they behave well; subject, however, to such limitations, on account of age, as may be provided by the constitution of the state; and that they should have honorable salaries, ascertained and established by standing laws.

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TITLE I
THE STATE AND ITS GOVERNMENT

CHAPTER 5-B
POOLED RISK MANAGEMENT PROGRAMS

Section 5-B:1

5-B:1 Purpose. – The purpose of this chapter is to provide for the establishment of pooled risk management programs and to affirm the status of such programs established for the benefit of political subdivisions of the state. The legislature finds and determines that insurance and risk management is essential to the proper functioning of political subdivisions; that risk management can be achieved through purchase of traditional insurance or by participation in pooled risk management programs established for the benefit of political subdivisions; 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 and establishment of costs predicated solely on the actual experience of political subdivisions within the state; that the resources of political subdivisions are presently burdened by the securing of insurance protection through standard carriers; and that pooled risk management programs which meet the standards established by this chapter should not be subject to insurance regulation and taxation by the state.

Source. 1987, 329:1, eff. July 24, 1987.

Section 5-B:2

5-B:2 Definitions. – In this chapter:
I. "Department" means the department of state.
II. "Informational filing" means an annual filing with the department made solely for the purpose of providing public access to certain information concerning the nature and organization of pooled risk management programs. Such informational filing shall be limited to the following:
(a) The name and legal address of each pooled risk management program;
(b) A list of current officers, their titles and addresses;
(c) A brief description of the coverage provided;
(d) The annual audit required under RSA 5-B:5, I(d);
(e) A written plan of operation or bylaws; and
(f) The annual actuarial evaluation required under RSA 5-B:5, I(f).
III. "Political subdivision" means 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 or funded by any of the above-named governmental units.
IV. "Risk management" means the defense of claims and indemnification for losses arising out of the ownership, maintenance, and operation of real or personal property and the acts or omissions of officials, employees, and agents; the provision of loss prevention services including, but not limited to, inspections of property and the training of personnel; and the investigation, evaluation, and settlement of claims by and against political subdivisions.

Source. 1987, 329:1. 1995, 260:1, eff. July 1, 1995. 2008, 354:1, eff. Sept. 5, 2008.

Section 5-B:3

5-B:3 Pooled Risk Management Authorized and Affirmed; Membership. –

I. A political subdivision, by resolution of its governing body, may establish and enter into agreements for obtaining or implementing insurance by self-insurance; for obtaining insurance from any insurer authorized to transact business in this state as an admitted or surplus lines carrier; or for obtaining insurance secured in accordance with any method provided by law; or for obtaining insurance by any combination of the provisions of this paragraph. Agreements made pursuant to this paragraph may provide for pooling of self-insurance reserves, risks, claims and losses, and of administrative services and expenses associated with them among political subdivisions. To accomplish the purposes of this chapter, 2 or more political subdivisions may form an association under the laws of this state or affirm an existing association so formed to develop and administer a risk management program having as its purposes reducing the risk of its members; safety engineering; distributing, sharing, and pooling risks; acquiring insurance, excess loss insurance, or reinsurance; and processing, paying and defending claims against the members of such association.

II. RSA 53-A shall not apply to an association formed or affirmed under this chapter, nor to the participation in such an association by a political subdivision.

III. Pooled risk management programs established for the benefit of political subdivisions may provide any or all of the following coverages:

(a) Casualty, including general and professional liability; errors and omissions; workers' compensation and employer's liability; medical payments; or unemployment compensation as authorized under federal law.

(b) Property, including marine and inland navigation; transportation; boiler and machinery; fire; theft; or natural hazards.

(c) Vehicle, including any liability or loss arising from the ownership or operation of vehicles.

(d) Surety and fidelity.

(e) Environmental impairment.

(f) Hospital, medical, surgical or dental benefits for employees and their dependents.

(g) Life, income maintenance, accidental death and dismemberment, vision loss or impairment, or legal benefits for employees and their dependents.

Source. 1987, 329:1, eff. July 24, 1987.

Section 5-B:4

5-B:4 Informational Filing Required; Fee. – Pooled risk management programs established for the benefit of political subdivisions shall make an informational filing, as defined in RSA 5-B:2, II, with the department and shall pay an annual filing fee of $150. The department may make requests for additional information necessary to exercise regulatory or enforcement authority pursuant to, but not limited to, the hearings procedures under RSA 421-B:26-a over any pooled risk management program formed or affirmed in accordance with this chapter. Pooled workers' compensation and unemployment compensation programs which are regulated by and which report to the department of labor and the department of employment security, under RSA 281-A and RSA 282-A, respectively, shall be exempt from the requirements of this section as long as their operations and reports conform to the laws and rules adopted by those departments.

Source. 1987, 329:1. 1994, 158:16, eff. May 23, 1994. 2009, 128:2, eff. June 29, 2009.

Section 5-B:4-a

[RSA 5-B:4-a repealed by 2010, 149:8, III, effective July 1, 2013.]

5-B:4-a Authority of the Secretary of State; Investigations; Cease and Desist Orders; Penalties. –

I. Notwithstanding any other provision of law, the secretary of state shall have exclusive authority and jurisdiction:

(a) To bring administrative actions to enforce this chapter.

(b) To investigate and impose penalties for violations of this chapter, including but not limited to:

(1) Fines.

(2) Rescission, restitution, or disgorgement.

II. The secretary of state shall have all powers specifically granted or reasonably implied in order to perform the substantive responsibilities imposed by this chapter.

III. For the purpose of any investigation, hearing, or proceeding under this chapter, the secretary of state or any officer designated by him or her may administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the secretary of state deems relevant or material to the inquiry.

IV. In the event that a person refuses to obey a subpoena issued to him or her or any order or determination the secretary of state is authorized to make, the superior court, upon application by the attorney general or secretary of state or any officer designated by the secretary of state, may issue to the person an order directing him or her to appear before the attorney general or secretary of state, or the officer designated by him or her, to produce documentary evidence if so ordered or to give evidence relative to the matter under investigation or in question. Failure to obey the order of the court may be punished by the court as contempt of court.

V. 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.

VI. Whenever it appears to the secretary of state that any person has engaged or is about to engage in any act or practice constituting a violation of this chapter or any rule or order under this chapter the secretary of state shall have the power to issue and cause to be served upon such person an order requiring the person to cease and desist from violations of this chapter. The order shall be calculated to give reasonable notice of the rights of the person to request a hearing on the order and shall state the reasons for the entry of the order. All hearings shall be conducted in accordance with RSA 421-B:26-a.

VII. The following fines and penalties may be imposed on any person who has violated this chapter.

(a) Any person who, either knowingly or negligently, violates any provision of this chapter or any rule or order thereunder, may, upon hearing, and in addition to any other penalty provided for by law, be subject to an administrative fine not to exceed $2,500. Each of the acts specified shall constitute a separate violation.

(b) After notice and hearing, the secretary of state may enter an order of rescission, restitution, or disgorgement directed to a person who has violated this chapter, or rule or order under this chapter. Rescission, restitution, or disgorgement shall be in addition to any other penalty provided for under this chapter.

VIII. Decisions of the secretary of state may be appealed to the supreme court pursuant to RSA 541.

Source. 2010, 149:3, eff. June 14, 2010.

Section 5-B:5

5-B:5 Standards of Organization and Operation. –

I. Each pooled risk management program shall meet the following standards of organization and operation. Each program shall:

(a) Exist as a legal entity organized under New Hampshire law.

(b) Be governed by a board the majority of which is composed of elected or appointed public officials, officers, or employees. Board members shall not receive compensation but may be reimbursed for mileage and other reasonable expenses.

(c) 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.

(d) Provide for an annual audit of financial transactions by an independent certified public accountant. The audit shall be filed with the department and distributed to participants of each pooled risk management program.

(e) Be governed by written bylaws which shall detail the terms of eligibility for participation by political subdivisions, the governance of the program and other matters necessary to the program's operation. Bylaws and any subsequent amendments shall be filed with the department.

(f) Provide for an annual actuarial evaluation of the pooled risk management program. The evaluation shall assess the adequacy of contributions required to fund any such program and the reserves necessary to be maintained to meet expenses of all incurred and incurred but not reported claims and other projected needs of the plan. The annual actuarial evaluation shall be performed by a member of the American Academy of Actuaries qualified in the coverage area being evaluated, shall be filed with the department, and shall be distributed to participants of each pooled risk management program.

(g) Provide notice to all participants of and conduct 2 public hearings for the purpose of advising of potential rate increases, the reasons for projected rate increases, and to solicit comments from members regarding the return of surplus, at least 10 days prior to rate setting for each calendar year.

II. If a pooled risk management program fails to provide for an annual audit or an annual actuarial evaluation, the department shall perform or cause to be performed the required audit or evaluation and shall be reimbursed the cost by the program.

Source. 1987, 329:1. 1997, 14:1, eff. June 21, 1997. 2010, 149:4, 5, eff. June 14, 2010.

Section 5-B:6

5-B:6 Declaration of Status; Tax Exemption; Liability. –

I. Any pooled risk management program meeting the standards required under this chapter is not an insurance company, reciprocal insurer, or insurer under the laws of this state, and administration of any activities of the plan shall not constitute doing an insurance business for purposes of regulation or taxation.

II. Any such program operating under this chapter, whether or not a body corporate, may sue or be sued; make contracts; hold and dispose of real property; and borrow money, contract debts, and pledge assets in its name.

III. Participation by a political subdivision in a pooled risk management program formed and affirmed under this chapter shall not subject any such political subdivision to any liability to any third party for the acts or omissions of the pooled risk management program or any other political subdivision participating in the program.

Source. 1987, 329:1, eff. July 24, 1987.

Section 5-B:7

5-B:7 Confidentiality of Certain Claims Information. – Notwithstanding any provision of law to

the contrary, any information of any pooled risk management program formed or affirmed under this chapter pertaining to claims analysis or claims management shall be privileged and confidential and not subject to disclosure to any third party.

Source. 1987, 329:1, eff. July 24, 1987.

TITLE XXXVIII
SECURITIES

CHAPTER 421-B
SECURITIES

Miscellaneous Provisions

Section 421-B:26-a

421-B:26-a Hearing Procedures. –

I. Notwithstanding any other law to the contrary, 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. 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.

II. A document shall be considered filed when it is actually received at the department's office in Concord, New Hampshire, and conforms to the requirements of this chapter.

III. For the purposes of this section:

(a) All complaints, petitions, motions, responses, and replies shall be signed by the proponent of the document or, if the party appears by a representative, by the representative.

(b) License, registration, and exemption applications shall be signed only by the applicant or properly authorized designee.

(c) The signature on a document filed with the department shall constitute a certification that:

(1) The signer has read the document and is authorized to file it;

(2) There are good grounds to support the representations made therein; and

(3) The document has not been filed for purposes of delay or harassment.

(d) A willful violation of subparagraph (c), shall, to the extent consistent with the policy of the statutes administered by the secretary of state, be a basis for entering an order adverse to the party committing the violation.

IV. Within a reasonable time after receipt of a complaint:

(a) The department staff or a presiding officer shall review the complaint to determine whether any basis exists for administrative action.

(b) If the complaint is insufficient or no basis exists which warrants administrative action, the complaint shall be dismissed and no hearing shall be scheduled on such complaint.

(c) If the staff determines that sufficient basis exists which warrants administrative action, the staff shall petition the secretary of state for relief.

(d) On any complaint, the staff shall temporarily defer any action and refer the subject matter of the complaint to the appropriate agency if a more complete investigation is necessary. The results of the investigation shall be used to determine the necessity of conducting a hearing by the department.

V. Within a reasonable time after receipt of a petition:

(a) The secretary of state may issue an order either denying or granting the petition or granting in part and denying in part. If any part of the petition is granted, the respondent shall be informed, as part of the hearing notice, of the respondent's right to a hearing.

(b) A petition may include a request for summary action prior to a hearing.

(c) The staff may, sua sponte, petition for relief whenever it has reasonable grounds to believe that a violation of law or rule has occurred, is occurring, or is about to occur.

VI. Notices of hearings shall:

(a) 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.

(b) Given in writing and addressed to the address of record of the person being called in for the hearing. The notice shall be prepared on an official form of the department and shall be sent in a sealed envelope through the United States mail, personal services, or by Federal Express or other similar delivery service.

VII. A notice of hearing shall include:

(a) The time, date, and location of the hearing.

(b) The statute or rule which has allegedly been violated and a statement of the legal authority under which the hearing is to be held.

(c) An explicit description of the alleged violation or a copy of the complaint or petition for relief or both the copy of complaint and petition for relief.

VIII. Each hearing shall be set for a date as soon as practicable after the complaint has been received and reviewed. The hearing shall be scheduled to allow sufficient and reasonable time for the preparation of the case by both the department and interested parties.

IX. A request for continuance of a hearing shall be made in writing and received by the department, absent exigent circumstances, at least 5 working days prior to the hearing. Exigent circumstances are described as, but not limited to:

(a) Absence from the jurisdiction;

(b) Serious illness;

(c) Hospitalization;

(d) Death of a family member.

X. The written request or motion for continuance shall contain the following:

(a) The specific reason or reasons for the request; and

(b) Optional dates and times when all interested parties shall be available.

XI. Each presiding officer may, at any stage of the hearing process, withdraw from a case if the presiding officer has or has had a personal or business relationship with any party, witness, or representative that may hinder such presiding officer from being able to arrive at an impartial decision on the issue or issues, or for any other reason that may interfere with the presiding officer's ability to remain impartial.

XII. Parties shall have the right to:

(a) Appear pro se or be represented by an attorney.

(b) Cross-examine witnesses, and

(c) Present evidence and witnesses on their own behalf.

XIII. Except as provided as follows, administrative hearings shall be open to the public:

(a) The presiding officer may, on the presiding officer's own motion or at the request of a party, rule that the public be excluded from a hearing if necessary, pursuant to RSA 91-A:3, II, to protect the interests and rights of the parties to the hearing.

(b) In matters involving sensitive issues, a presiding officer may consult with the office of the attorney general for a ruling on the privacy issue.

(c) Members of the press shall be admitted to the hearing whenever the public is permitted. If the press is present at a hearing, the presiding officer shall brief them, off the record, in the presence of all parties, as to the nature and purpose of the hearing.

(d) In the event a party objects to the attendance of persons not involved in the hearing, the presiding officer shall ascertain the reason for such objection and determine whether the reason given justifies closing the hearing to such persons.

XIV. Subject to the laws governing the department of state, and within the general scope of his powers, each presiding officer shall have the authority to:

(a) Schedule and hold hearings.

(b) Administer oaths and affirmations.

(c) Issue subpoenas on behalf of the state.

(d) Determine the order of proof in any proceeding.
(e) Receive relevant evidence and rule on offers of proof in hearings.
(f) Take judicial notice of any facts which are of common knowledge and general notoriety.
(g) Take, or cause to be taken, depositions.
(h) Regulate and control the course of an administrative hearing.
(i) Hold conferences for the settlement or simplification of issues, or for obtaining stipulations as to issues of fact or proof by consent of the parties.
(j) Dispose of procedural requests, including adjournments or continuances at the request of the parties or on the presiding officer's own motion.
~~(k) Interview and examine witnesses and parties as the case may require.~~
(l) Direct parties to appear at hearings.
(m) Consider and evaluate the facts and evidence on the record in making findings of fact and conclusions of law and dispositions.
(n) Determine credibility or weight of evidence in making findings of fact and conclusions of law.
(o) Render oral and written decisions, reports, or recommendations as authorized by statute or rule.
(p) Take any action in a proceeding necessary to conduct and complete the case, consistent with applicable statutes, rules, and precedents.

XV. During any proceeding, the secretary of state shall, upon motion or upon his own motion, direct all parties to attend an informal conference to aid in the disposition of the proceeding. Such conferences:

(a) May be recorded unless all parties wish to discuss possible settlements off the record. Such recordings shall be part of the record.
(b) Shall be held, in addition to settlement possibilities, to consider:
(1) Possible simplification of the issues.
(2) Possible amendments to the pleadings.
(3) Possible admissions of fact, admissions of documents, or other stipulations which might avoid unnecessary proof.
(4) The identification and possible limitations on the number of witnesses.
(5) Possible changes to the method of proceeding or hearing schedule which would otherwise be applicable.
(6) The distribution of written testimony, if any, and exhibits to the parties.
(7) Possible consolidation of the examination of witnesses by the parties.
(8) Any other matters which might contribute to the prompt, orderly, and fair conduct of the proceeding.

A prehearing conference or other informal conference shall be conducted in person or, with the consent of the parties, shall be conducted by means of electronic communications.

XVI. The presiding officer shall cause the administrative hearing to be electronically recorded. Such recording shall be made available, upon written request by a party and upon a fee sufficient to reimburse the full cost of providing the tape, or a true and accurate copy of such tape or tapes. A party may request, in writing, a transcript of the hearing but shall first pay the full costs for such transcription as determined by the secretary of state.

XVII. In the event there is a clear dispute of facts between the parties in which credibility of testimony will determine the outcome of the hearing, the presiding officer on his own motion or that of a party, may sequester witnesses until they are called to testify.

XVIII. In any administrative hearing in which administrative action affecting the rights or privileges of any party may be taken, an oath or affirmation shall be administered by the presiding officer to each witness prior to receiving testimony, provided, however, that if a witness asserts an objection to the taking of an oath for religious or other related reasons, an affirmation shall be administered. Once a witness has been sworn at any hearing, it shall not be necessary to swear the witness again for subsequent testimony on the same day and in the same case. The record of the proceeding shall indicate that a person was recalled to testify and reminded that such person was still under oath or affirmation.

XIX. Motions shall be in written form unless presented at the hearing. Written motions shall be included in the record of the proceeding and filed together with the case file. Oral motions shall be recorded in full in any transcript of the proceeding or, at the discretion of the presiding officer, noted in the minutes of the proceeding and submitted in written form within a reasonable time. A presiding officer may rule upon a motion when made or may defer decision until a later time in the hearing, or until after the conclusion of the hearing.

XX. Administrative hearings shall not be bound by common law or statutory rules of evidence, nor by technical or formal rules of procedure. All relevant, material, and reliable evidence shall be admissible. Such evidence may include, but shall not be limited to, depositions, affidavits, official documents, and testimony of witnesses. Provided, however, the presiding officer may, in the presiding officer's discretion, exclude any irrelevant, immaterial, unreliable, or unduly cumulative or repetitious evidence. Applicable statutory and constitutional provisions and immunities requiring exclusion of evidence in civil proceedings shall be recognized, provided, however, that nothing contained herein shall prohibit a party from waiving such party's privilege or immunity.

XXI. Within a reasonable time after the hearing, the presiding officer shall issue a written decision stating the action to be taken by the department and may set forth findings of fact, conclusions of law, and disposition. All decisions shall be reached upon the basis of a preponderance of the evidence. The decision of the presiding officer shall be construed as the decision of the secretary of state.

XXII. Any party to whom notice has been forwarded pursuant to and in accordance with these rules who fails to appear shall have a default judgment rendered against him.

XXIII. The presiding officer may take judicial notice.

XXIV. Where the interests of justice will be better served without prejudice to the substantial rights of any party, a presiding officer may sever one case from another or may consolidate 2 or more cases, preserving to all parties the right of appeal from the single or several decisions rendered.

XXV. Once a hearing notice has been issued commencing an adjudicatory proceeding, no party shall communicate with the presiding officer or the secretary of state concerning the merits of the case except upon notice to all parties nor shall any party cause another person to make such communications.

XXVI. Within 30 days after a final decision, any party may file a motion for reconsideration which shall serve as a petition for rehearing under RSA 541. No distinctions shall be made between the terms "reconsideration" and "rehearing." A motion for reconsideration shall:

(1) Identify each error of law, error of reasoning, or erroneous conclusion contained in the final order which the moving party wishes the secretary of state to reconsider.

(2) Concisely state the correct factual finding, correct reasoning, and correct conclusion being advocated.

(3) Include any memorandum of law the petitioner wishes to submit.

XXVII. Within 30 days after a final decision, the presiding officer may reconsider, revise or reverse any final action on the presiding officer's own motion. If reconsideration is based upon the existing record, prior notice shall not be given to the parties. If the presiding officer believes further information or argument should be considered, the parties shall be provided with an appropriate notice and opportunity to be heard before any revision is made in the previous action.

XXVIII. The filing of a motion for reconsideration shall not operate as a stay of any order or decision, but a motion for stay may be combined with a motion for reconsideration.

Source. 1996, 239:34, eff. Aug. 9, 1996.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541
REHEARINGS AND APPEALS IN CERTAIN CASES

Section 541:1

541:1 Definition. – The word "commission" as here used means the public utilities commission, the milk sanitation board, or any state department or official concerning whose decision a rehearing or appeal is sought in accordance with the provisions of this chapter.

Source. RL 414:1. RSA 541:1. 1967, 345:2, 5. 1989, 138:8. 1996, 228:103, eff. July 1, 1996.

Section 541:2

541:2 Uniform Procedure. – When so authorized by law, any order or decision of the commission may be the subject of a motion for rehearing or of an appeal in the manner prescribed by the following sections.

Source. RL 414:2.

Section 541:3

541:3 Motion for Rehearing. – Within 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.

Source. 1913, 145:18. PL 239:1. 1937, 107:14; 133:75. RL 414:3. RSA 541:3. 1994, 54:1, eff. Jan. 1, 1995.

Section 541:4

541:4 Specifications. – Such motion shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. No appeal from any order or decision of the commission shall be taken unless the appellant shall have made application for rehearing as herein provided, and when such application shall have been made, no ground not set forth therein shall be urged, relied on, or given any consideration by the court, unless the court for good cause shown shall allow the appellant to specify additional grounds.

Source. 1913, 145:18. PL 239:2. 1937, 107:15; 133:76. RL 414:4.

Section 541:5

541:5 Action on Motion. – Upon the filing of such motion for rehearing, the commission shall within ten days either grant or deny the same, or suspend the order or decision complained of pending further consideration, and any order of suspension may be upon such terms and conditions as the commission may prescribe.

Source. 1913, 145:18. PL 239:3. 1937, 107:16; 133:77. RL 414:5.

Section 541:6

541:6 Appeal. – Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court.

Source. 1913, 145:18. PL 239:4. 1937, 107:17; 133:78. RL 414:6.

Section 541:7

541:7 Petition. – Such petition shall state briefly the nature of the proceeding before the commission, and shall set forth the order or decision complained of, and the grounds upon which the same is claimed to be unlawful or unreasonable upon which the petitioner will rely in the supreme court.

Source. 1913, 145:18. PL 239:5. 1937, 107:18; 133:79. RL 414:7.

Section 541:8

541:8 Parties. – Any person or corporation whose rights may be directly affected by said appeal may appear and become a party, or the court may order such persons and corporations to be joined as parties as justice may require.

Source. 1913, 145:18. PL 239:6. 1937, 107:19; 133:80. RL 414:8.

Section 541:9

541:9 Notice to Commission. – Upon the filing of an appeal, the clerk of court shall issue an order of notice requiring the commission to file with the court a certified copy of the record in the proceeding, together with such of the evidence introduced before or considered by the commission as may be specified by any party in interest, as well as such other evidence, so introduced and considered, as the commission may deem proper to certify, together with the originals or copies of all exhibits introduced in evidence before the commission.

Source. 1913, 145:18. PL 239:7. 1937, 107:20; 133:81. RL 414:9.

Section 541:10

541:10 Other Notice. – Such notice as the court may order shall also be given to persons and corporations who were parties to the proceeding before the commission, or who may be ordered joined by the court.

Source. 1913, 145:18. PL 239:8. 1937, 107:21; 133:82. RL 414:10.

Section 541:11

541:11 Fees for Copies. – The commission shall collect from the party making the appeal a fee of ten cents per folio of one hundred words for the copy of the record and such testimony and exhibits as shall be transferred, and five cents per folio for manifold copies, and shall not be required to certify the record upon any such appeal, nor shall said appeal be considered, until the fees for copies have been paid.

Source. 1915, 99:3. PL 239:9. 1937, 107:22; 133:83. RL 414:11.

Section 541:12

541:12 Argument. – Upon the filing of said copy of the record, evidence, and exhibits, the case shall be in order for argument at the next regular session of the court, unless the same be postponed for good cause shown.

Source. 1913, 145:18. PL 239:10. 1937, 107:23; 133:84. RL 414:12.

Section 541:13

541:13 Burden of Proof. – Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

Source. 1913, 145:18. PL 239:11. 1937, 107:24; 133:85. RL 414:13.

Section 541:14

541:14 Additional Evidence. – No new or additional evidence shall be introduced in the supreme court, but the case shall be determined upon the record and evidence transferred, except that in any case, if it shall be necessary in order that no party shall be deprived of any constitutional right, or if the court shall be of the opinion that justice requires the reception of evidence of facts which have occurred since the hearing, or which by reason of accident, mistake, or misfortune could not have been offered before the commission, it shall remand the case to the commission to receive and consider such additional evidence.

Source. 1913, 145:18. PL 239:12. 1937, 107:25; 133:86. RL 414:14. 1951, 203:13, eff. Sept. 1, 1951.

Section 541:15

541:15 Action of Commission. – Upon receipt of such evidence, the commission shall consider the same and may alter, modify, amend, or rescind the order or decision appealed from, and shall report its action thereon to the court within said twenty days.

Source. 1913, 145:18. PL 239:15. 1937, 107:28; 133:89. RL 414:17.

Section 541:16

541:16 Subsequent Proceedings. – If the commission shall rescind the order appealed from the appeal shall be dismissed; if it shall alter, modify, or amend the same such altered, modified, or amended order shall take the place of the original order complained of, and the court shall render judgment with reference thereto in said appeal as though said order had been made by the commission in the first instance, after allowing any amendments of the pleadings or other incidental proceedings desired by the parties which the changed situation may require.

Source. 1913, 145:18. PL 239:16. 1937, 107:29; 133:90. RL 414:18.

Section 541:17

541:17 Evidence, How Considered. – All evidence transferred by the commission shall be considered by the court regardless of any technical rule which might have rendered the same inadmissible if originally offered in the trial of an action at law.

Source. 1913, 145:18. PL 239:17. 1937, 107:30; 133:91. RL 414:19. 1951, 203:15, eff. Sept. 1, 1951.

Section 541:18

541:18 Suspension of Order. – No appeal or other proceedings taken from an order of the commission shall suspend the operation of such order; provided, that the supreme court may order a suspension of such order pending the determination of such appeal or other proceeding whenever, in the opinion of the court, justice may require such suspension; but no order of the public utilities commission providing for a reduction of rates, fares, or charges or denying a petition for an increase therein shall be suspended except upon conditions to be imposed by the court providing a means for securing the prompt repayment of all excess rates, fares, and charges over and above the rates, fares, and charges which shall be finally determined to be reasonable and just.

Source. 1913, 145:18. PL 239:18. 1937, 107:31; 133:92. RL 414:20. 1951, 203:16, eff. Sept. 1, 1951.

Section 541:19

541:19 Conditions. – Any order of the court suspending an order of the public utilities commission fixing rates, fares, charges, or prices shall, among other things, provide that the public utility affected by the order suspended shall keep such accounts as shall suffice to show the amount being collected by such public utility, pending the appeal, in excess of the amounts which it would have collected if the order or decree of the commission had not been suspended, and shall provide such means as the court shall determine to secure the prompt repayment of all excess rates, fares and charges over and above the rates, fares and charges which shall finally be determined to be reasonable and just.

Source. 1913, 145:18. PL 239:19. 1937, 107:32; 133:93. RL 414:21. 1951, 203:17, eff. Sept. 1, 1951.

Section 541:20

541:20 Contempt of Court. – Whenever there is occasion after final decision for the distribution of said excess, any violation on the part of any public utility, or of the officers or members thereof, of the order of the court providing for the repayment of said excess may be punished as a contempt of court.

Source. 1951, 203:18. RL 414:21-a.

Section 541:21

541:21 Exceptions. – The provisions of this chapter shall not apply to appeals from the assessment of damages in eminent domain proceedings, but such appeals shall be taken and prosecuted as otherwise provided.

Source. 1951, 203:19. RL 414:21-b.

Section 541:22

541:22 Remedy Exclusive. – No proceeding other than the appeal herein provided for shall be maintained in any court of this state to set aside, enjoin the enforcement of, or otherwise review or impeach any order of the commission, except as otherwise specifically provided.

Source. 1913, 145:18. PL 239:22. 1937, 107:33; 133:94. RL 414:22.