STATE OF NEW HAMPSHIRE
DEPARTMENT OF STATE

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

HEALTHTRUST'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISQUALIFY PRESIDING OFFICER

HealthTrust, Inc. ("HealthTrust") submits this memorandum of law in support of its motion to disqualify the Presiding Officer from presiding over the New Hampshire Bureau of Securities Regulation's ("BSR") Motion for Entry of Default Order ("Motion"). In short, the system by which the Presiding Officer was unilaterally selected by the New Hampshire Secretary of State ("Secretary") and the terms of his contract with the Secretary violate HealthTrust's right to due process pursuant to U.S. Const. Amend. XIV and N.H. Const. part I, article 35, because there is a pecuniary incentive implicit in the selection process and the contract.

PROCEDURAL HISTORY

On February 7, 2014, the BSR filed the Motion, the purpose of which the BSR claims is to "effectuate the penalty" stated in the Final Order dated August 16, 2012 ("Final Order") for Respondents' failure to timely reorganize. On or about February 14, 2014, and before HealthTrust objected or otherwise responded to the Motion, the BSR requested that the Presiding Officer hold a scheduling conference related to the Motion. On February 18, 2014, HealthTrust filed an objection to the Motion. HealthTrust's objection challenged the Presiding Officer's jurisdiction over the Motion and objected to the merits of the Motion.

On February 18, 2014, the Presiding Officer issued a Notice of Preliminary Conference ("Notice"). The Notice stated that the Presiding Officer would conduct a Preliminary

Conference on March 10, 2014. The Notice also directed that counsel must confer not less than four days before the Preliminary Conference "for the purpose of discussing whether the issue of continuing jurisdiction can be considered by the presiding official on the parties' submission of an agreed statement of facts and memoranda of law with oral argument by each party . . . ."

A Preliminary Conference was held on March 10, 2014. The next day, the Presiding Officer issued a Scheduling Order and Notice of Hearing Regarding Issue of Jurisdiction ("Scheduling Order"). The Scheduling Order set dates for the parties to file various pleadings and scheduled a hearing on any motion to dismiss for lack of jurisdiction on April 14, 2014.

At the Preliminary Conference, HealthTrust inquired about the terms of the Presiding Officer's contract with the Secretary for presiding over proceedings related to the Motion. The Presiding Officer informed HealthTrust that the terms of his current contract are similar to the terms set forth in his contract with the Secretary to preside over the original proceeding that led to the Final Order.[1] The Presiding Officer suggested that, as was the case with his prior contract and amendments, he would be paid a set amount on a bi-weekly basis for the duration of the proceedings. The Presiding Officer also suggested that a copy of his contract with the Secretary could be obtained through a RSA 91-A request to the BSR or the Secretary.

The next day, on March 11, 2014, HealthTrust forwarded a RSA 91-A request to the Secretary. On March 28, 2014, HealthTrust received a reply and a copy of the contract.[2] The reply did not include any correspondence, email or other explanatory information regarding the process by which the Secretary and the Presiding Officer arrived at the contract terms. Ex. A, p.

[1] Respondents moved for the disqualification of the Presiding Officer on due process grounds in the original proceeding, and the Presiding Officer denied the motion. The New Hampshire Supreme Court subsequently found that Respondents' due process claim was waived because it was raised too late in the proceeding. *Appeal of the Local Government Center, Inc. & a.*, No. 2012-729, slip op. at 20-21 (N.H. January 10, 2014). Consequently, the Supreme Court did not rule on the merits of the issue.

[2] Copies of the reply and the contract are attached to this memorandum of law as Exhibit A ("Ex. A").

1. However, the contract itself demonstrates that the Presiding Officer executed the contract on February 7, 2014, the same date that the BSR filed the Motion. Ex. A, p. 2.

The contract includes a "Price Limitation" of $50,000. Ex. A, p. 2. It provides a "Completion Date" of June 30, 2014, although the "[c]ontract period may be extended, if necessary, until September 30, 2014." Ex. A, pp. 2, 7. Consistent with the Presiding Officer's representation at the Preliminary Conference, he is to submit invoices to the Secretary on a semi-monthly basis. Ex. A, p. 7. Consistent with the previous contract between the Secretary and the Presiding Officer, the contract does not require approval by the Governor, Executive Council or Attorney General. Ex. A, p. 8. The services to be provided pursuant to the contract are defined as follows: "All statutory duties of a Hearings Officer in connection with an administrative hearing relative to the Local Government Center and related parties." Ex. A, p. 6.

On April 10, 2014, less than two weeks after receipt of the contract from the Secretary, HealthTrust filed its motion to disqualify the Presiding Officer. No substantive hearings have been held in the proceeding, and the Presiding Officer has not issued any substantive rulings related to the Motion.

ARGUMENT

The system by which the Presiding Officer was unilaterally selected by the Secretary, and the terms of the contract between the Secretary and the Presiding Officer, violate HealthTrust's due process right to a fair and impartial hearing because there is a pecuniary interest implicit in the selection process and the contract.

No right is more sacred than one's right to due process of law when charged by the sovereign with unlawful conduct. U.S. Const. amend. XIV (A state shall not "deprive any person of life, liberty, or property, without due process of law."); N.H. Const. part I, article 35 ("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.").

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Because the system pursuant to which the Presiding Officer was unilaterally selected as presiding officer by the Secretary, and the Presiding Officer's contract with the Secretary, provide him with an implicit pecuniary interest in the outcome of the proceeding, the Presiding Officer must disqualify himself from presiding over proceedings related to the Motion.

The threshold of fairness and impartiality is that a judicial officer must have no pecuniary interest in the outcome of the matter. *See Appeal of Grimm*, 141 N.H. 719, 721 (1997); N.H. Const. part I, article 35 ("It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit."). "'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. at 721 (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). This essential right to an impartial decision-maker extends to administrative proceedings. *See Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973); *In re Town of Bethlehem*, 154 N.H. 314, 330 (2006).

An arrangement need not directly tie the adjudicator's compensation to the outcome of a case to offend due process. *See Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61 (1972) (substantial revenue to village derived from fines and fees imposed from convictions in mayor's court). Both direct and indirect pecuniary interests violate due process. *See Tumey v. Ohio*, 273 U.S. 510, 532-34 (1927) (mayor received fees and costs in addition to salary if he convicted accused prohibition violators); *Connally v. Georgia*, 429 U.S. 245, 250-51 (1977) (justice of peace paid if search warrant issued and not paid if warrant application declined); *State ex rel. Reece v. Gies*, 198 S.E. 2d 211, 216 (W.Va. 1973) (justice of peace received additional fee if plaintiff prevailed at civil proceeding and writ of execution issued).

Because "our system of law has always endeavored to prevent even the probability of unfairness," *In re Murchison*, 349 U.S. at 136, "[e]very procedure which would offer a possible temptation to the average man as judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." *Id.* (quoting *Tumey*, 273 U.S. at 532). Hence, the test is one of "possible temptation," where the mere appearance of bias violates due process, *see Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-25 (1986) (judge had own pending lawsuit that involved similar issue to issue present in case over which he presided and issued ruling on similar issue), and it is immaterial that the pecuniary interest may be *de minimis*. *See Connally*, 429 U.S. at 251 ($5.00 fee only if search warrant issued); *Gies*, 198 S.E. at 216 (additional fee of $2.50 if writ of execution issued).

The test does not require proof of individual bias; rather, a system that creates a financial incentive violates due process. *See Lucky Dogs LLC v. City of Santa Rosa*, 913 F.Supp.2d 853, 862 (N.D. Cal. 2012); *Haas*, 45 P.3d at 286. Thus, the determination of whether there is an impermissible pecuniary interest turns on the methods of selection and compensation, and how they would affect a rational person in the position of the adjudicatory officer, not on whether there is evidence of partiality on the part of the particular adjudicatory officer. *See, e.g.*, *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 61 (1972) (holding that statutory provision providing for "disqualification of interested, biased, or prejudiced judges" was not a "sufficient safeguard to protect" a petitioner's rights, because requiring a petitioner to "show special prejudice in his particular case . . . requires too much and protects too little"); *Brown v. Vance*, 637 F.2d 272, 282 (5th Cir. Jan. 1981) ("We need find no instance of actual judicial bias to hold the fee system constitutionally infirm. *Tumey* and *Ward* do not require proof of actual judicial prejudice or of a direct pecuniary interest in the outcome of particular cases.").

In *Haas v. County of San Bernardino*, 45 P.3d 280 (2002), the California Supreme Court examined a similar practice of appointing ad hoc administrative hearing officers and found that it violated due process. Many of the facts in *Haas* are similar to the system and contract present here. For example, in *Haas*:

- The hearing officer "had not previously served as a hearing officer and had been hired to hear only the matter at hand."[3]
- The hearing officer had been hired by the Deputy County Counsel, where the County was the administrative agency bringing the case.
- The hearing officer was "only paid for the work she actually performs . . . in connection with this hearing."

Id. at 283-84. On those facts, 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 violating due process rights. *Id.*

The *Hass* court summarized its ruling 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. The court analyzed the principles governing pecuniary interests thusly:

> [D]ue process requires fair adjudicators in courts and administrative tribunals alike. While the rules governing the disqualification of administrative hearing officers are in some respects more flexible than those governing judges, the rules are not more flexible on the subject of financial interest. Applying those rules, courts have consistently recognized that a judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge's income from judging depends on the number of cases handled. No persuasive reason exists to treat administrative hearing officers differently.

[3] HealthTrust assumes, but does not know, that the original proceeding was the Secretary's first appointment of the Presiding Officer to adjudicate a proceeding.

Id. at 285-86. The system was condemned as unconstitutional, despite the absence of "proof of actual judicial prejudice or of a direct pecuniary interest in the outcome of particular cases," *id.* at 288, because administrative agencies that are free to select their adjudicator will be "presumed to favor [their] own rational self-interest by preferring those who tend to issue favorable rulings," and the adjudicators, in turn, will "have a 'possible temptation . . . not to hold the balance nice, clear and true,'" *id.* at 288-89.

More recently, in *Lucky Dogs LLC v. City of Santa Rosa*, a federal district court in the California examined the City of Santa Rosa's "system of unilaterally selecting hearing officers and hiring them to renewable two year terms." 913 F.Supp.2d at 863. Santa Rosa unilaterally selected administrative enforcement hearing officers and hired the hearing officers pursuant to renewable two year contracts that paid the officers $200.00 per hour. *Id.* at 855. The hearing officers were awarded fees from the losing party to the proceeding. *Id.* at 860.

The federal court found that the system violated due process. Finding multiple flaws, similar to those present here, the court stated as follows:

> Plaintiff alleges a due process violation based on Defendant's subjecting Plaintiff to an adjudicator with a financial interest in the outcome of the proceeding. Plaintiff asserts that Santa Rosa allows their hearing officers to award themselves fees from the losing party, which gives them a financial interest in the outcome of the case. Plaintiff also asserts that the prospects of the hearing officers obtaining future appointments by the City of Santa Rosa depends solely on the City's good will, which violates Plaintiff's due process rights. The Court agrees.
>
> On any individual case, that a hearing officer is awarded fees from the losing party does not create a problem; the hearing officer simply wants to be paid for that one case, and is paid no matter which side loses. But there is a problem where there are multiple cases, or the possibility of multiple cases, and where the City is a repeat player. Then the hearing officer has a financial incentive to rule in the City's favor, because the hearing officer presumably would like the City to hire her again, and she might reasonably believe that it is more likely to do so if she rules in its favor. Being paid by the losing party under such circumstances creates an additional incentive for the hearing officer to try to ingratiate herself with the

> City; ruling for the City then would not only entitle the City to the tax award/penalties sought, but would spare the City the cost of the hearing officer.

Id.

The court explained that, "while a two-year contract is preferable to a case-by-case, *ad hoc*, appointment, it does not eliminate the *Haas* court's concern about '[a] procedure holding out to the adjudicator, even implicitly, the possibility of future employment in exchange for favorable decisions,'" which that court found created "'an objective, constitutionally impermissible appearance and risk of bias.'" *Id.* at 861 (*quoting Haas*, 45 P.3d at 280). The court properly found that "[t]he risk that a hearing officer in that position would be incentivized to stay in the City's good graces in order to continue to have her contract renewed every two years is real." *Id.*

Importantly, the court recognized that "[t]he problem is not with any individual hearing officer . . ., but with a system that creates an improper financial incentive for *all hearing officers* . . . ." *Id.* at 861-62 (italics in original). The court stressed that proof of actual bias is unnecessary for a system to be unconstitutional because "the Constitution is concerned not only with actual bias but also the appearance of justice." *Id.* at 862 (quotations and citations omitted).

Consequently, due process is offended when a quasi-judicial officer's compensation is tied to the duration of a matter or the prospect of future government employment. *Haas, 45 P.3d* at 286; *Lucky Dogs LLC*, 913 F.Supp.2d at 861-62. Due process is equally offended when the quasi-judicial officer "is incentivized" to curry favor with the regulatory agency. *Lucky Dogs LLC*, 913 F.Supp.2d at 862. Additionally, an intolerable incentive or temptation exists when a hearing officer unilaterally selected by the regulator must or may award the regulator its fees. *Id.* at 860 (shifting fees to losing party "creates an additional incentive for the hearing officer to try to ingratiate herself with the [regulator]; ruling for the [regulator] then would not only entitle the

[regulator] to the tax award/penalties sought, but would spare the [regulator] the cost of the hearing officer.")

Here, many possible temptations and incentives are implicit in the system pursuant to which the Presiding Officer was unilaterally selected by the Secretary and in the terms of the Presiding Officer's contract with the Secretary. The facts demonstrate the following systemic and individual "possible temptations" that violate due process because of their implicit, and in fact apparent, bias in favor of the Secretary: (a) the Secretary unilaterally selected and pays the Presiding Officer in a proceeding in which fees will be awarded to the Secretary if he prevails on the Motion, *see Lucky Dogs LLC*, 913 F.Supp.2d at 860; (b) the Presiding Officer's compensation is tied to the duration of a matter, *see Haas*, 45 P.3d at 286; (c) the Presiding Officer will be paid more by denying dispositive motions than if he grants them, *see Connally*, 429 U.S. at 251; *Gies*, 198 S.E. at 216; and (d) the prospect of future employment provides incentive for the Presiding Officer to favor the Secretary, *see Lucky Dogs LLC*, *Lucky Dogs LLC*, 913 F.Supp.2d at 862; *Haas*, 45 P.3d at 286. The system cannot provide these implicit temptations and incentives, and still claim to preserve the "right of every citizen to be tried by judges as impartial as the lot of humanity will admit." *See* N.H. Const. part I, article 35.

Each of the identified flaws in the process individually "offer[s] a possible temptation to the average man as judge . . . not to hold the balance nice, clear, and true . . . ." *In re Murchison*, 349 U.S. at 136 (quoting *Tumey*, 273 U.S. at 532). Collectively, the temptations and incentives provide a cognizable "probability of unfairness." *See Appeal of Grimm*, 141 N.H. at 721 ("'A *per se* rule of disqualification due to the probability of unfairness, applies when the trier has pecuniary interests in the outcome.'") (quoting *Plaistow Bank & Trust Co.*, 121 N.H. at 754). Consequently, the system pursuant to which the Presiding Officer was unilaterally selected by

the Secretary, and the Presiding Officer's contract with the Secretary, violate HealthTrust's Federal and State constitutional right to due process, even in the absence of proof of actual prejudice. *See id.*; U.S. Const. amend. XIV; N.H. Const. part I, article 35.

CONCLUSION

For the foregoing reasons, the Presiding Officer should disqualify himself from consideration of the Motion. The system pursuant to which the Presiding Officer was unilaterally selected by the Secretary, and the terms of his contract with the Secretary, violate HealthTrust's right to due process pursuant to U.S. Const. amend. XIV and N.H. Const. part I, article 35, because there is a pecuniary incentive implicit in the selection process and the contract.

Respectfully submitted,

HEALTHTRUST, INC.

By Its Attorneys,

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CERTIFICATE OF SERVICE

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

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