

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF STATE

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

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**HEALTHTRUST’S REPLY TO BSR’S OBJECTION  
TO JOINT MOTIONS TO DISMISS  
FILED BY HEALTHTRUST, INC. AND PROPERTY-LIABILITY TRUST, INC.**

HealthTrust, Inc. (“HealthTrust”) submits this reply to the Bureau of Securities Regulation’s (“BSR”) objection to HealthTrust’s and Property-Liability Trust, Inc.’s (“PLT”) motions to dismiss the Motion for Entry of Default Order (“Motion”) for lack of jurisdiction.

**SUMMARY OF ARGUMENT**

The BSR does not respond to the primary jurisdictional issue - HealthTrust’s contention that the Presiding Officer lacks jurisdiction over the Motion because the applicable statutes require that allegations of violations by conduct more than a year after the Final Order dated August 16, 2012 (“Final Order”) be heard in a new proceeding. Instead, the BSR argues that the Presiding Officer possesses jurisdiction over the Motion because he retained jurisdiction over the timely reorganization directive in the Final Order, and HealthTrust and PLT did not challenge that portion of the Final Order. This BSR argument fails because the Presiding Officer was divested of jurisdiction over the Final Order’s reorganization directive when the New Hampshire Supreme Court not only asserted jurisdiction over the issue, but also found that Respondents had complied with the directive. Consequently, the Presiding Officer could not have retained jurisdiction over the issue. In fact, the Presiding Officer’s consideration of the issue is barred by the doctrine of *res judicata*.

The BSR's other argument, that RSA 5-B implicitly grants the Presiding Officer jurisdiction, also fails. First, *res judicata* bars the Presiding Officer's consideration of the BSR's claim of violation of the Final Order's timely reorganization requirement under any theory of jurisdiction. Additionally, the BSR's argument misinterprets RSA 5-B and ignores well-established New Hampshire law. Even if the New Hampshire Supreme Court had not asserted jurisdiction over, and decided, the issue, the BSR's claim must be adjudicated through a new administrative proceeding because neither RSA 5-B:4-a nor RSA 421-B:26-a authorizes a Presiding Officer to exercise jurisdiction over post-Final Order conduct, or for the purpose of enforcing the Final Order.

Rather than responding to HealthTrust's contention that the Presiding Officer lacks jurisdiction to hear the Motion because the applicable statutes require that allegations of violations by conduct more than a year after the Final Order be heard in a new proceeding, the BSR asserts that the only purpose of the Motion is to "effectuate the penalty" stated in the Final Order for failure to timely reorganize and contends that Chapter 5-B grants the Presiding Officer implicit authority to enforce the Final Order's penalty provisions. However, that question of remedy – not jurisdiction – is properly considered only as part of the merits of the matter. It is separate from the question whether the Secretary is required to proceed by a new administrative action.

## **ARGUMENT**

### **I. The Presiding Officer Cannot "Retain Jurisdiction" Over an Issue Accepted by, and Ultimately Decided by, the New Hampshire Supreme Court.**

The BSR's argument, that "the Presiding Officer retained jurisdiction to enforce the Final Order and Respondents did not challenge this portion of the order[,]” Objection, p. 1, should be dispatched quickly. Not only is it untrue that the Presiding Officer retained jurisdiction over the

issue, but, more importantly, the New Hampshire Supreme Court already has found that HealthTrust and PLT complied with the timely reorganization requirement of the Final Order. *See Appeal of Local Government Center, Inc. & a.*, No. 2012-729 [*“Appeal”*], slip op. at 10 (N.H. January 10, 2014). Thus, the Presiding Officer not only relinquished jurisdiction over the issue, the doctrine of *res judicata* precludes further consideration of the matter. *See Kalil v. Town of Dummer ZBA*, 159 N.H. 725, 730 (2010).

The BSR correctly alleges that the Final Order required that “[n]o later than 90 days from the date of this Order, 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.” Objection, p. 11; Final Order, p. 73 ¶ 1. The BSR also is correct that the Final Order states that the failure to timely reorganize “shall . . . 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 . . . .” Objection, p. 11; Final Order, p. 73 ¶ 2. The BSR’s argument fails, however, because it is incorrect that “[b]y giving Respondents a timeline by which to achieve compliance, the Presiding Officer directly retained jurisdiction to, at the very least, determine whether Respondents timely reorganized.” *See* Objection, p. 11.

Respondents included the reorganization requirement as an appellate issue in their Notice of Appeal, and the Supreme Court accepted the appeal. Thereafter, in their brief, Respondents advised the Court that they had “since complied with these provisions and take[] no further appeal from those portions of the Order.” Appellants’ Brief, p. 11 n 9. The BSR did not dispute or otherwise challenge Respondents’ representation that they had complied with the Final Order’s directive to timely reorganize the risk management pools. In the *Appeal*, the New Hampshire Supreme Court recognized that the Presiding Officer construed RSA 5-B “to require

that each pooled management program be governed by its board of directors and by its own bylaws.” *Appeal*, slip op. at 6. Acknowledging that Respondents had elected not to continue their pursuit of that portion of the Final Order, the Supreme Court stated as follows: “[i]nasmuch as the respondents have not appealed the above-described portions of the presiding officer’s decision, we assume, without deciding, that they were correctly decided.” *Appeal*, slip op. at 6.

The acknowledgement, however, was not the Supreme Court’s last word on the timely reorganization requirement. When the Supreme Court discussed the specific remedies required by the Final Order, it began with the reorganization requirement. *Appeal*, p. 10. The Court recognized that, “[t]o remedy the violations of RSA 5-B:5, I(b) and (e), the presiding officer ordered LGC to reorganize HealthTrust and P-L Trust ‘into a form that provides each program with an independent board and its own set of written bylaws.’” *Id.* The Court then unequivocally stated:

**The respondents complied with this portion of the presiding officer’s decision in the fall of 2013.<sup>[1]</sup>**

*Id.* (emphasis added).

The BSR did not move for reconsideration or rehearing of the Supreme Court’s finding that Respondents complied with the Final Order’s timely reorganization directive. Hence, it became a final determination of the issue when the Supreme Court issued its mandate following the appellate decision. *See Carelton, LLC v. Balagur*, 162 N.H. 501, 505-06 (2011).

The Supreme Court’s express finding that Respondents complied with the Final Order’s requirement of reorganization proves that it asserted jurisdiction over the issue. Because the Supreme Court asserted jurisdiction over the issue, the Presiding Officer could not have retained jurisdiction over the issue. *See Appeal of Public Service Co. of N.H.*, 130 N.H. 285, 297 (1988)

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<sup>1</sup> The reorganization actually occurred in the fall of 2012.

(“perfection of an appeal vests exclusive jurisdiction in [the New Hampshire Supreme Court] over those matters arising out of, and directly related to, the issues presented by the appeal”).

Moreover, the Supreme Court’s express finding on the Final Order’s reorganization directive precludes further consideration of the issue pursuant to the doctrine of *res judicata*.

The New Hampshire Supreme Court has described the doctrine as follows:

Res judicata precludes the litigation in a later case of matters actually decided, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action. *Id.* The doctrine applies when three elements are met: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered in the first action. *Id.*

*Kalil*, 159 N.H. at 730 (quoting *Sleeper v. Hoban Family P’ship*, 157 N.H. 530, 533 (2008)).

Here, all three elements are met for *res judicata*. There is an identity of parties. The cause of action was before the Supreme Court. The Supreme Court rendered a final judgment on the merits of the issue. *Appeal*, p. 10. Consequently, the Presiding Officer did not retain jurisdiction over the issue of Respondents’ compliance with the Final Order’s timely reorganization directive, and *res judicata* bars the Presiding Officer’s consideration of the issue. *See Appeal*, p. 10; *Kalil*, 159 N.H. at 730.

## **II. The BSR’s Argument That RSA 5-B Implicitly Provides the Presiding Officer with Jurisdiction Misconstrues the Statute and Established New Hampshire Law.**

The BSR commences its argument with the same premise as the argument addressed above. In support of its argument that the Presiding Officer has implicit authority to enforce the Final Order, the BSR argues: “[b]ecause Respondents did not challenge the Presiding Officer’s authority to impose the penalty of forfeiture and because enforcement of the penalty provision of the Final Order is a reasonably implied power necessary to perform the substantive responsibilities imposed by RSA chapter 5-B, Respondents’ jurisdictional challenge fails.”

Objection, p. 4. As a preliminary matter, *res judicata* bars the Presiding Officer's continuing consideration of the BSR's claim of violation of the Final Order's timely reorganization requirement under any theory of jurisdiction.

Additionally, the BSR's argument that RSA 5-B implicitly grants the Presiding Officer jurisdiction should be rejected because it misinterprets the statute and ignores well-established New Hampshire law. The BSR argues that the Presiding Officer has jurisdiction over the Motion because RSA 5-B:4-a, I(b), authorizes the Secretary to "impose penalties for violations" of the statute, and RSA 5-B:4-a, II grants the Secretary "all powers specifically granted or reasonably implied in order to perform the substantive responsibilities imposed by this chapter." This confuses the Secretary's power to impose penalties with the process to be followed in pursuing them. The BSR's interpretation of RSA 5-B misconstrues the statute and ignores well-established New Hampshire law regarding the limitation on an agency's jurisdiction and authority.

"Administrative agencies are granted only limited and special subject matter jurisdiction." *In re Campaign for Ratepayers' Rights*, 162 N.H. 245, 250 (2011) (quoting *Appeal of Amalgamated Transit Union*, 144 N.H. 325, 327 (1999)). An agency's jurisdiction "is dependent entirely upon the statutes vesting the agency with power and the agency cannot confer jurisdiction upon itself." *Id.* (brackets and citation omitted). "Furthermore, a tribunal that exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." *In re Campaign for Ratepayers' Rights*, 162 N.H. at 250 (quotation and citation omitted).

The BSR's argument also ignores the plain language of the relevant statutes. RSA 5-B:4-a, I(a) authorizes the Secretary "[t]o bring administrative actions to enforce [RSA ch. 5-B]."

Although the Secretary “shall have all powers specifically granted or reasonably implied in order to perform the substantive responsibilities imposed by [RSA ch. 5-B,]” RSA 5-B:4-a, II, the statute also expressly provides the action available to the Secretary if he believes a person or entity has violated an order issued pursuant to RSA ch. 5-B. RSA 5-B:4-a, VI states as follows:

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. (emphasis added).

The statute does not provide an alternative to the issuance of a cease and desist order for addressing a suspected violation of RSA ch. 5-B or of an Order issued pursuant to RSA ch. 5-B. *See id.* It does not authorize reopening the proceeding in which the order issued.

RSA 5-B:4-a, VI, provides that, if the Secretary issues a cease and desist order, it “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.” The statute also states that “[a]ll hearings shall be conducted in accordance with RSA 421-B:26-a.” *Id.* RSA 421-B:26-a, I, authorizes the Secretary to appoint a presiding officer to conduct the adjudicatory proceeding. The statute also provides a list of the acts a presiding officer is authorized to undertake. RSA 421-B:26-a, XIV.

RSA 421-B:26-a, XIV does not authorize a presiding officer to exercise jurisdiction over conduct that occurs after an administrative proceeding has concluded. The statute does not authorize a presiding officer to enforce a final order. *See id.* Instead, a presiding officer’s post-final order jurisdiction is limited to specific conduct related to reconsideration of a final order within 30 days. *See* RSA 421-B:26-a, XXVII. Such a limitation on a presiding officer’s

jurisdiction is consistent with the express grant of jurisdiction “*to conduct and complete the case.*” RSA 421-B:26-a, XIV(p) (emphasis added).

The cases from foreign jurisdictions relied on by the BSR for the proposition that administrative agencies possess broad, ostensibly implicit authority are inapposite. *Matter of Valley Road Sewerage Co.* involved a statute that provided New Jersey’s Board of Public Utilities with “‘general supervision and regulation of and jurisdiction and control over all public utilities . . . and their property, property rights, equipment, facilities and franchises so far as may be necessary for the purpose of carrying out the provisions’ of the statute.” 685 A.2d 11, 15 (N.J. Super. Ct. App. Div. 1996) (*quoting* N.J.S.A. 48-2-13) (emphasis added). The New Jersey Supreme Court “has characterized this statute as a ‘sweeping’ grant of jurisdiction ‘intended to delegate the widest range of regulatory over public utilities.’” *Id.* at 15-16 (citations omitted).

*Hawes v. Colorado Division of Insurance*, 65 P.3d 1008 (Colo. 2003), is equally unpersuasive. The grant of authority to award attorneys’ fees found in *Hawes* was not based on the Colorado agency’s statutory authority. *Id.* at 1024. Rather, the Colorado court found that, “during conversion of a nonprofit health care insurer to a for-profit corporation . . . [b]ecause the legislature empowered the Commissioner to do whatever is necessary to accomplish the conversion . . . the Commissioner can award attorneys’ fees *under the common fund doctrine when there is no legislative abrogation of the common law right . . .*” *Id.*

In fact, the only New Hampshire case cited by the BSR, *In re JAMAR*, 145 N.H. 152 (2000), also does not support the BSR’s argument. In *In re JAMAR*, “the sole issue on appeal [was] whether the [New Hampshire Compensation Appeals Board] had authority to grant a rehearing to review its initial conclusion regarding the nature of the respondent’s injury.” *Id.* at 153. The Supreme Court held only the following: “[w]hen [a] mistake is alleged to have been

committed by the board, we conclude that RSA 281-A:48 provides the board with the limited authority to review its own decisions for mistakes in the first instance.” *Id.* 155-56 (citation omitted). Thus, rather than recognizing expansive agency authority, as urged by the BSR, *In re JAMAR* merely reaffirms the well-established maxim that an agency should be afforded the first opportunity to correct its alleged error. *Id.* at 155 (allowing board to review its own mistake furthers the purpose of judicial economy).

The proper statutory interpretation does not lead to the absurd result urged by the BSR. Rather, the statutes respect the need for finality regarding an individual proceeding. Here, the BSR’s concern is plainly misplaced. While the BSR attempts to conjure an image of momentary compliance only to be followed by prolonged non-compliance, the facts belie the image. As found by the Supreme Court, Respondents complied with the Final Order’s directive to reorganize consistent with the Presiding Officer’s interpretation of RSA 5-B. The reorganization took place in November 2012.

It is undisputed that the conduct challenged in the Motion occurred between October 2013 and January 2014. The conduct about which the BSR complains, therefore, occurred more than a year after the Final Order issued on August 16, 2012. The passage of more than a year between the Final Order and the challenged conduct, and the intervening act of the decision in the *Appeal*, belie the BSR’s claim of “cat and mouse game.” Objection, p. 9. Instead, the events demonstrate why a new proceeding is required to address new allegations of conduct that violates RSA 5-B.

### **III. The Presiding Officer Lacks Jurisdiction Over Alleged Violations From The Settlement Agreement Entered Long After The Final Order.**

The BSR fails to directly address the issue presented by HealthTrust’s motion: whether the Presiding Officer is authorized to reopen this proceeding to exercise jurisdiction over alleged

violations of Chapter 5-B and the Final Order by the Settlement Agreement entered more than a year after the Final Order. The Presiding Officer lacks jurisdiction because the statutes do not authorize him to conduct proceedings concerning post-final order conduct or to enforce a final order issued in the initial proceeding. As discussed in section II above, the relevant statutes limit the presiding officer's authority to completing the proceedings and do not contemplate subsequent enforcement proceedings. See RSA 421-B:26-a. The statutes concerning the procedures to be followed by the Secretary provide for separate proceedings where the Secretary contends a person has violated any order under RSA 5-B. See RSA 5-B:VI, VII(b). Administrative officials only have the authority that is "expressly granted or fairly implied by statute," so other procedures are not available. *In re Chase Home for Children*, 155 N.H. at 533.

Instead of responding to these points, the BSR narrows its Motion and frames the question as one of the Secretary's authority to impose penalties or enforce a final order. BSR Objection at 3-4 (citing RSA 5-B:4-a, I and II). However, the issue is not the Secretary's authority but the process for exerting that authority. The Secretary plainly has means at his disposal to seek to impose penalties or enforce a final order. He could issue a cease and desist order. See RSA 5-B:4-a, VI (authorizing Secretary "to issue and cause to be served" cease and desist orders where a person appears to be violating "any rule or order under this chapter"). The question is whether the BSR can short-circuit those procedures and return to an existing proceeding if it contends that a program has later become non-compliant with an administrative order. The statutes do not authorize a presiding officer to reopen proceedings to address subsequent alleged non-compliance with a final order.

Chapter 5-B provides for hearings to be "conducted in accordance with RSA 421-B:26-a." RSA 5-B:4-a, VI. That statute, in turn only authorizes a presiding officer "to conduct and

complete the case,” and it limits the presiding officer’s ability to address matters that are the subject of a final decision to a period “[w]ithin 30 days.” RSA 421-B:26-a,XIV(p), XXVI, XXVII. The statute does not contemplate an ongoing supervisory proceeding before a presiding officer. Alleged violations based on conduct more than a year after the Final Order require a new case. The BSR and Presiding Officer do not have the authority to change the administrative process provided by statute in order to deny HealthTrust the right to contest the BSR’s claim of violations or to challenge the BSR’s proposed remedies in separate proceedings.

The BSR spends much of its Objection arguing that deprivation of 5-B status – a potential corporate death penalty – is an “approved remedy” that the Presiding Officer may enforce. Objection at 3-4, 6-9. Although the issue is immaterial because the question now before the Presiding Officer is whether there is jurisdiction to hear the matter at all, not whether he has authority to impose a particular penalty, HealthTrust disagrees.<sup>1</sup> Questions of penalty are part of the merits, and they can properly be considered only after a determination on the merits, since any penalty must be proportionate to any violation found (and HealthTrust maintains there is none).

#### **IV. The BSR’s Argument Regarding Due Process Merely Reinforces That the Motion Should Be Dismissed.**

The BSR declares that Respondents’ argument that due process requires that the Secretary review the BSR’s claim before action is taken against is “without merit.” Objection, p.

13. The BSR explains that, “the Motion merely effectuates the penalty previously stated in the

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<sup>1</sup> Among other things, HealthTrust notes that the statute authorizes specified relief in RSA 5-B:4-a, I(b), V, VI, and VII. Nowhere does the chapter authorize the “death penalty” sought by the BSR. The BSR appears to assume that it has licensing authority (that is, the ability to revoke a regulated entity’s ability to do business). However, the Legislature did not grant that authority to the Secretary as it has to other agencies (such as the Insurance Department, see RSA 402:10, RSA 401-B:12). In the absence of legislation, the agency cannot confer such power on itself. See *Appeal of Somersworth School Dist.*, 142 N.H. 837, 841 (1998). HealthTrust never had the opportunity to challenge that penalty on appeal, as it stood undisputed that Respondents complied with the timely reorganization requirement. Thus, the penalty question became moot. The determination in paragraph 2 of the Final Order accordingly cannot have preclusive effect. See *Restatement (Second) of Judgments* § 28, comment a (1982).

Presiding Officer's Final Order . . . [and] Respondents, therefore, had adequate notice that their failure to 'timely reorganize as ordered in § 1 [of the Final Order]' would result in forfeiture of their statutory exemption and all of the benefits afforded said status." Objection, p. 13.

As explained in section I above, the New Hampshire Supreme Court's express finding that Respondents complied with the Final Order's requirement of reorganization, *Appeal*, p. 10, precludes the Presiding Officer's jurisdiction based on a "continuing violation of RSA chapter 5-B and the Final Order." Moreover, the finding bars further litigation in this the underlying administrative proceeding to enforce a conditional remedy for an alleged continuing violation pursuant to the doctrine of *res judicata*. Because the BSR alleges that the only purpose of the Motion is to effectuate the Final Decision's timely reorganization directive, the Motion should be dismissed for lack of jurisdiction.

### **CONCLUSION**

The Motion should be dismissed for lack of jurisdiction because the Presiding Officer was divested of jurisdiction over the only issue raised in the Motion, whether Respondents complied with the Final Order's timely reorganization directive, when the New Hampshire Supreme Court not only asserted jurisdiction over the issue, but also found that Respondents had complied with the directive. Consequently, the Presiding Officer could not have retained jurisdiction over the issue. Moreover, the Presiding Officer's consideration of the issue is barred by the doctrine of *res judicata*.

Even if the Supreme Court had not asserted jurisdiction over, and decided, the issue, the BSR's claim must be adjudicated through a new administrative proceeding because neither RSA 5-B:4-a nor RSA 421-B:26-a authorizes a Presiding Officer to exercise jurisdiction over post-Final Order conduct, or for the purpose of enforcing the Final Order.

Respectfully submitted,

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By Its Attorneys,

Dated: April 10, 2014

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**CERTIFICATE OF SERVICE**

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

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