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.;	)	Case No: C2011000036
LGC – HT, LLC;	)	
Local Government Center Workers' Compensation Trust, LLC;	)	
And the following individuals:	)	
Maura Carroll;Peter J. Curro; and John Andrews	)	
RESPONDENTS	)	

PETITIONER'S MEMORANDUM OF LAW IN SUPPORT OF ITS OBJECTION TO RESPONDENTS' MOTION FOR REHEARING OF MOTION FOR RECUSAL OF PRESIDING OFFICER

NOW COMES Petitioner, the New Hampshire Bureau of Securities Regulation (the "BSR" or the "Petitioner"), through counsel Bernstein, Shur, Sawyer & Nelson, P.A., and submits this Memorandum of Law setting forth the reasons why Respondents' original motion for withdrawal was correctly denied on May 11, 2012.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner rejects Respondents' presentation of the facts in their memorandum of law as incomplete and inaccurate, and provides its own review of the relevant facts here. Petitioner further objects to the Respondents' reportage of conversations that occurred off the record because the Presiding Officer's decision must be based on the evidence in the record, and not on unverified reports of off-the-record conversations that convert counsel to witnesses.

Respondents initially raised their oral motion off the record and undersigned counsel immediately demanded that the discussion be placed on the record. Petitioner further asserts that the Presiding Officer gave the Respondents full opportunity to place on the record relevant evidence when they made their oral motion on the last day of the parties' two-week adjudicatory proceeding. Respondents thus had the opportunity to place additional evidence in the record, and cannot now use their Memorandum of Law to supplement the evidence with their view of facts that were known or knowable at the time.

1. The Respondents' Memorandum of Law is procedurally barred.

The Respondents filed a pleading styled as a Memorandum in Support of Oral Motion for Withdrawal of Presiding Officer on May 30, 2012. The memorandum purports to support a motion upon which the Presiding Officer issued a final ruling on May 11, 2012. See Hearing Transcript (hereinafter "HT") at 2317. The Respondents neither sought nor were granted the opportunity to keep the record open for a period of time to allow for supplementation of their previously fully litigated motion. It is therefore improper for the Respondents to attempt to submit new evidence on this or any issue in their Memorandum. As explained below and throughout, the Respondents have been on notice of the Presiding Officer's pay arrangement since October 4, 2011, when Mr. Mitchell explained his arrangement on the record and advised the LGC's lead counsel to file a "Right to Know" request if he wanted further information. If the Memorandum purports to be a motion for rehearing pursuant to R.S.A. 541:3 and R.S.A. 421-B:26-a, XXVI, it fails in that regard as well as it seeks to offer new evidence, is not styled as such, and does not request a new hearing on the issue of recusal. See id.

2. The Respondents have been aware of the nature of the Presiding Officer's contract since October 4, 2011, but did not raise any issues with it until the last day of the adjudicatory proceeding.

Turning to the motion itself, Respondents orally moved for Presiding Officer Mitchell to withdraw from the hearing on the last day of the parties' two week adjudicatory proceeding at the end of a nine month administrative action. See HT at 2305. On that day, the Respondents claimed to have just learned that Mr. Mitchell had a purported pecuniary interest in the outcome of the case because they claimed his pay increases the longer this proceeding goes on. A review of the factual and procedural history of this case makes plain that the Respondents have been on notice of the basis for Mr. Mitchell's compensation since the Presiding Officer disclosed it to lead counsel for the Local Government Center, Inc. ("LGC") during an October 4, 2011 hearing where counsel for all present Respondents appeared, and that the Respondents have repeatedly elongated this administrative process through their own actions to cause the perceived problem of which they now complain, including by requesting that the hearing in this matter be postponed in order to accommodate the schedule of the LGC's lead counsel.

On October 4, 2011, lead counsel for the LGC inquired into Mr. Mitchell's background and the particulars of his pay arrangement. Mr. Mitchell reviewed his background and qualifications, and with respect to his pay he stated as follows:

> William Saturley (WS): Thank you very much for the thorough disclosure and for the disclosure of your approach to this, which I appreciate very much. I would ask, if at some point, you would reveal the terms of the engagement so that we may understand whether or not there are limitations, and the scope of your engagement as it pertains to this matter.
>
> Donald Mitchell (DM): Sure. May I just make one inquiry of you?
>
> WS: Sure.
>
> DM: Have you obtained this information by right-to-know already?

WS: I have not. We made inquiry, to which we had no response.

DM: Okay, well I think the best way to start is to say that I no longer work for the State, other than right now, I guess I am a consultant, presiding officer for purposes of this hearing. That is to say, what I understand, is that technically I am a vendor.

WS: A ven –

DM: A vendor. Okay?

WS: Thank you.

DM: So I am not an employee, and I believe – I believe that – well I know I have a contract. I don't know what the contract number is. Each contract that a vendor has in New Hampshire has a contract number. I am sorry, I don't have mine. ***And the length of that contract right now runs through, I believe it is December 22nd, but please give me a fudge-factor of a week or so there. The remuneration is equivalent to what I was receiving when I left state service last year. And I believe that that comes out to a little bit over $400.00 a day, but I am paid in increments of $5,000.00.*** If anyone else in this room knows anything more about my contract, please help Mr. Saturley out. That's – and so – that's my understanding. ***Now I believe that the representation is that the contract could be rolled over if you all take more than three months.***

WS: So when you said December 22nd, I assume that means the end of 2011.

DM: ***Yes. And I believe that I was offered a longer contract, and I said, "Well that won't be necessary." So, unless you're going to throw me out, I don't have any anticipation that I would go to the bank with, but I suspect if we get to December 22nd and you all haven't worked this thing out that I may be asked to continue as the hearing officer.*** I believe those are the – oh, I get mileage when I come to Concord. Let me go further because you all should be at the same information level. And that is that the statute lays some things out that I should comply with – and I will comply with. And part of it is to make sure – I think it was the legislature's intention – that laypeople have some understanding of what goes on here so that you can better judge what the proceedings are and that is similar for the media. So, let me also say that it's – it's going to be alright if the counsel that are representing the various parties that have been named, can all get along together. Administrative hearings are a little bit different and those of you that have been in courtrooms already can tell the difference. And I don't mean by, you know, certain perks or softer chairs, or chairs that don't wiggle, but this is what we have for right now. And later on in the morning, I am going to ask some counsel to start cooperating with each other on some matters. The, you didn't ask this Mr. Saturley, but for counsels' expectations, I am the full-time staff person. Megan is able to give me twelve hours a week. That's essentially it. We had an

> intern from University of New Hampshire's law school, but there are scheduling problems that are arising in that. So, what you see up here is what is trying to respond to whatever you all may do, and I would just ask you that you keep that in mind. We will do the best we can. We were doing it last night until about 7:30 or 9:30, respectively. Have I answered your question thoroughly enough?
>
> WS: You have sir. Thank you very much.

See Ex. A (emphasis supplied), Transcript of a portion of audio of October 4, 2011 Pre-hearing Conference Part I (available at: http://www.sos.nh.gov/LOCGOVCTR/index.html) (hereinafter "Pre-hearing Conference Transcript"); Ex. B, Aff. of Kristina Mann (swearing that Ms. Mann truthfully transcribed the audio from the recording of the October 4, 2011 hearing).

Thus, as of October 4, 2011, Respondents' counsel knew that Mr. Mitchell would be paid $5,000 every two weeks until the end of December 2011 regardless of the outcome of the proceedings, and that if the proceedings had not concluded by then, it was likely that his contract would be extended at the same level in order to allow him to finish the proceedings. It should further be noted that Mr. Mitchell advised LGC's counsel to pursue further information through a "Right to Know" request under R.S.A. Ch. 91-A. Despite the discussion on October 4, 2011 and counsel's representation that information had been requested, the Respondents apparently did not make such a request of follow up on any request they had made until May 11, 2012 (the same day they made their oral motion), as indicated by Attorney Saturley's letter of May 18, 2012 appended to the Respondents' Memorandum.

Examination of Mr. Mitchell's actual contract reveals further differences between the contract and what is reported in the LGC's motion. First, in an effort to bring Mr. Mitchell closer to the Secretary of State, the LGC has stated that it was the Secretary of State who appointed Mr. Mitchell. In fact, Mr. Mitchell's contract is between the State of New Hampshire and Mr. Mitchell, not the Secretary of State and Mr. Mitchell. See Ex. B to Respondents'

Memorandum at p. 1 ("The State of New Hampshire and the Contractor hereby mutually agree as follows…."). The contract also provides that Mr. Mitchell was hired for the entire case, meaning that he is contractually required to finish adjudicating the litigation no matter the number of hours it takes. See id. at p.5 (requiring Mr. Mitchell to provide "[a]ll statutory duties of Hearings Officer in connection with an administrative hearing relative to the Local Government Center and related parties."). Finally, though his contract was for a set amount, Mr. Mitchell was not paid a lump sum that he sought to increase by elongating the proceedings. Rather, he submitted invoices for payment in two week increments. See id. at pp. 23-39. As will be explained below, this practice is consistent with the ethical obligations of New Hampshire attorneys engaged in flat fee arrangements.

3. The Respondents' strategy was not to address the case against them on the merits, but rather to focus on other things, and as a result they intentionally delayed the completion of the proceedings through motions practice, frivolous objections, and intemperate conduct.

Earlier in this proceeding, the Respondents asserted an advice of counsel defense, and in so doing waived attorney-client privilege. The privilege waiver opened a window into the LGC's strategy in this litigation. That strategy, it turned out, was not to engage the BSR's case on the merits, but rather to "describe all the good things we do, and then…stick with it relentlessly." BSR Trial Ex. 41 at 45 (email from Attorney Mark McCue referring to "eloquently described" strategy of LGC lead counsel Attorney Saturley). Thus, it was LGC's stated strategy to relentlessly focus on the positive things they do, which necessarily means that the LGC's goal was to distract the Presiding Officer from other aspects of the proceeding, such as responding to the merits of the BSR's claims against the LGC. The results of this strategy appeared in the Respondents' conduct.

Because the improper pecuniary interest that the Respondents claim Mr. Mitchell has in the outcome of this proceeding springs from the length of the proceeding itself, it is important to understand that, consistent with a strategy that set to one side the merits of the BSR's case, it was the Respondents' tactics and requests for continuances that lengthened these proceedings over and over again. To begin with, it may be gleaned from the portion of Mr. Mitchell's comments quoted above that there was reason to believe that this matter may not require a full adjudicatory hearing. That was, in fact, true. In addition to the petition instituted against the LGC, it was also possible that similar petitions could be lodged against the LGC's two primary competitors in the insurance risk pool sector: Primex and SchoolCare. Indeed, at one point, the LGC claimed it was being "selectively prosecuted." The LGC participated in discussions involving the other risk pooled entities and the BSR during the pendency of the BSR's petition against the LGC; Primex and SchoolCare were able to reach voluntary agreements with the BSR that obviated the need for the BSR to institute a petition against those entities. See BSR Trial Exs. 64 and 65. Unlike its counterparts Primex and SchoolCare, the LGC refused to enter a similar agreement, and the result was the lengthy proceedings that form the basis of their present complaint.

The LGC's conduct during the run-up to the merits hearing itself is similar. Based on the Respondents' Memorandum, they apparently see no due process issue if Mr. Mitchell had completed the proceedings prior to May 31, 2012. On December 14, 2011, Mr. Mitchell set the evidentiary hearing in this matter to begin on April 9, 2012. See Dec. 14, 2011 *Scheduling Order*.[1] Had this remained the date for the hearing (or the Respondents raised their concerns and obtained an earlier hearing date), the parties could have completed their two week proceeding by April 23, 2012, and presumably completed all proceedings by May 31, 2012. Respondents, by

[1] All orders and motions filed in this proceeding are available on the Secretary of State's website at http://www.sos.nh.gov/LOCGOVCTR/index.html.

contrast, had originally asked for an October 2012 hearing date. See Oct. 3, 2012 *LGC's [Proposed] Structuring Conference Order*. Shortly after Mr. Mitchell set an April 9, 2012 hearing date, the LGC asked him to postpone the hearing in order to accommodate Mr. Saturley's schedule, and on December 30, 2012, Mr. Mitchell rescheduled the hearing to begin on April 30, 2012, and in the same order extended the due date for witness and exhibit lists to March 29, 2012. See Dec. 23, 2011 *LGC's Formal Notice of Potential Scheduling Conflict* and Dec. 30, 2012 *Revised Scheduling Order*. The Respondents did not object to the April 30th start date or raise any question about Mr. Mitchell's retention. Two weeks later, on January 13, 2012, the Respondents moved to postpone two more hearings because they wanted extra time. See Jan. 13, 2012 *Assented-To Motion to Reschedule Hearing on Bureau of Securities' Motion for Clarification and the Request for the Deposition of David Lang*. Mr. Mitchell granted this request on January 20, 2012. See Jan. 20, 2012 *Notice of Hearing*. On March 29, 2012, the LGC requested an extension of time to file witness and exhibit lists. See Mar. 29, 2012 *Assented-To Motion for Extension of Time for Parties to File Witness and Exhibit Lists*. On April 12, 2012, Mr. Mitchell issued an order outlining the procedure for the evidentiary hearing and, among other things, directed the parties to meet and confer in good faith and file a set of stipulated uncontested facts by April 27, 2012. See Apr. 12, 2012 *Order Confirming Certain Procedures for Evidentiary Hearing*. The Respondents were not completely responsive to efforts to streamline the proceeding or stipulate to facts, and as a result the parties had to spend time during the adjudicatory hearing addressing such issues. See, e.g., HT at 397 (Attorney Tilsley addressing the Presiding Officer: "[W]e're still awaiting a response to our stipulation of facts from the LGC so that we can get that submitted to you as well."). Finally, although the parties waived oral closing arguments and agreed to submit memoranda, the LGC's attorneys

specifically requested a briefing schedule that ran through June 4, 2012 in order to accommodate other demands on their time. See HT 2309-10. Of course, this briefing schedule went beyond the May 31, 2012 date in Mr. Mitchell's contract.

The Respondents' elongation of the proceedings through their conduct continued during the evidentiary hearing itself. Beginning on the first day, the Respondents raised numerous objections under the New Hampshire Rules of Evidence even though by statute "[a]dministrative hearings shall not be bound by common law or statutory rules of evidence, nor by technical or formal rules of procedure." R.S.A. 421-B:26-a, XXI. For example, Attorney Howard objected to the admission of a document because it purportedly contained hearsay. See HT at 250-51. The Presiding Officer denied the objection, id. at 255, but such objections continued throughout the proceeding.

The Respondents raised similarly frivolous objections to the testimony of BSR's witnesses. The first witness that the BSR presented was Michael A. Coutu. When BSR's counsel sought to introduce an exhibit containing financial information that Mr. Coutu had prepared, the LGC's attorney raised a non-specific objection to the veracity of the numbers in the chart. See HT at 137. ("I do want to make it clear that we've not had an opportunity to check whether or not these [figures] are complete."). The chart to which the LGC objected was an exhibit to Mr. Coutu's report as indicated in the title to the chart and was first presented to the LGC on February 17, 2012, consistent with the Bureau's expert disclosure requirements. The LGC did not specify the nature its objection until days later, when it finally identified two errors on Mr. Coutu's charts on the eighth day of the proceeding: (1) one portion of one of Mr. Coutu's charts inconsequentially represented 2001 and not 2002 as Mr. Coutu had labeled them; and (2)

one number on another of Mr. Coutu's charts should have been shown in parentheses because it was negative and not positive. See HT at 1712 and 1716-17.

The Respondents' approach with the materials of BSR witness Howard Atkinson was similar. During Mr. Atkinson's testimony regarding a chart he prepared, the LGC's counsel objected on the basis that the LGC had "no idea where [Mr. Atkinson] obtained those numbers from." See HT at 688. This prompted the following exchange:

> PRESIDING OFFICER: Mr. Volinsky, would you give me some more foundation on this.
>
> MR. VOLINSKY: Sure. Let's do Column 1, first.
>
> MR. ATKINSON. Um-hum.
>
> Q. Local Government Center numbers. You have a footnote here. What's the source of the numbers regarding the Local Government Center?
>
> A. The source is the Local Government HealthTrust audited financial statements as of December 31, 2010.
>
> Q. And second column, "SONH" means "State of New Hampshire"?
>
> A. Um-hum.
>
> Q. And "ERHBP" means "Employee and Retiree Health Benefit Program"?
>
> A. That's correct.
>
> Q. There's similarly a footnote here disclosing the source of the information you used to compile that column in the chart. Can you tell us what that source was.
>
> A. Yes. It's the State of New Hampshire self-funded Employee and Retiree Health Benefit Program annual report for the fiscal year ended June 30, 2010.
>
> Q. And is it available at the website that's included in the chart footnote No. 2?
>
> A. Yes.
>
> Q. And was this chart as it appears with those footnotes in your report itself?
>
> A. Yes, they were.

MR. VOLINSKY: I renew my motion.

THE PRESIDING OFFICER: Thank you. Anything further, Mr. Quirk?

MR. QUIRK: Nothing further, your Honor.

THE PRESIDING OFFICER: Then I'm going to deny that objection. Please proceed, Mr. Volinsky.

MR. VOLINSKY: And admit the exhibit?

THE PRESIDING OFFICER: And admit the exhibit.

MR. VOLINSKY: Thank you.

(BSR 13 admitted into evidence.)

Id. at 688-90. As this exchange demonstrates, one merely needed to read the footnotes on the exhibit itself—which had been provided to the LGC's attorneys in advance—to know the source of the numbers.[2]

The BSR undertakes this review of the LGC's conduct and tactics in litigating this proceeding in order to demonstrate that delays in the proceedings beyond May 31, 2012 that the LGC claims gives rise to an impermissible pecuniary interest on the part of Mr. Mitchell were not the result of Mr. Mitchell's actions, as the LGC suggests, but rather the result of the LGC's strategy to avoid addressing the case on the merits, postpone the proceedings, and spend time during the hearing raising frivolous objections in a contumacious manner. With this conduct in mind, the BSR addresses the LGC's legal arguments.

[2] The Respondents were also intemperate at trial. On the second day of the evidentiary hearing, Attorney Howard, counsel for one of the individual Respondents, objected to a portion of Mr. Coutu's testimony on the grounds that it was a previously undisclosed expert opinion. See Ex. HT at 235. After discussion regarding the opinion in question and further testimony, Attorney Howard stated: "That opinion was not been disclosed to my client. I haven't been charged with anything here, *but I sure as hell don't need to sit here and listen to opinions that haven't been disclosed*. And pardon my language." Id. at 239 (emphasis supplied). Attorneys for the other Respondents immediately joined in the objection. Id.

LEGAL ARGUMENT

1. The Respondents misstate the principles that apply to the recusal of presiding officers.

The LGC's motion raises the question of what due process requires of a presiding officer in an administrative proceeding. "Administrative officials that must serve in an adjudicatory capacity are presumed to be of conscience and capable of reaching a just and fair result. The burden is upon the party alleging bias to present sufficient evidence to rebut this presumption." Appeal of Maddox a/k/a Cookish, 133 N.H. 180, 182 (1990). This presumption of impartiality is consistent with the general rule that "a judge has a duty to preside over a case unless probative evidence demonstrates a reasonable factual basis to doubt his or her impartiality." Obert v. Republic Western Ins. Co., 190 F. Supp. 2d 279, 284 (D.R.I. 2002). With respect to proceedings pursuant to R.S.A. Ch. 421-B, the Secretary of State is permitted by statute to appoint a presiding officer and choose the time, date, and place of the hearing. See R.S.A. 421-B:26-a, at I, VII(a). That authority necessarily implies that the Secretary of State may retain and compensate any presiding officer he or she appoints. Once appointed, "[e]ach 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." Id. at XI.

Where the impartiality of a presiding officer is questioned, a different standard applies than would apply to a judge sitting in a civil or criminal proceeding. That is because while a "judge is a member of a separate and independent branch of government," presiding officers are employees of "an executive branch agency, and their "impartiality" must be considered within the context of the policy-making responsibility that officials of the agency...hold." Asmussen v.

Comm'r, 145 N.H. 578. 592 (2000) (*internal citations and quotations omitted*). Thus, "[i]nfluence ordinarily is not deemed improper unless it is aimed at affecting the outcome of a particular proceeding," id., and the "limitation of discretion does not, alone, constitute the denial of due process." Id. at 593. With the proper standards in place, the BSR turns to the Respondents' arguments.

2. The Presiding Officer accurately described his pay arrangement.

The Respondents' chief complaint is that Mr. Mitchell misrepresented the nature of his engagement by stating that he worked for a "flat fee" and failing to disclose that his overall compensation would be increased if the length of the proceedings increased. In fact, Mr. Mitchell explicitly told Attorney Saturley on October 4, 2011 that he was paid incrementally every two weeks and that, while he thought that a contract term extending beyond December 2011 would not be necessary, if the proceedings continued past that date it was likely that his contract and his receipt of payment every two weeks would as well. See Ex. A, Pre-Hearing Conference Transcript.[3] With respect to the Respondents' umbrage with Mr. Mitchell's description of his contractual arrangement as a "flat fee," it is important to consider how the New Hampshire Rules of Professional Responsibility treat flat fees. In 2007 and 2008, there was significant debate within the New Hampshire Bar regarding the interplay between flat fee arrangements and New Hampshire Rule of Professional Responsibility 1.15(d), which requires attorneys to keep legal fees from clients in their IOLTA accounts until they have been earned. See Ex. C, NHBA Ethics Committee, *Practical Suggestions for Flat Fees of Minimum Fees in Criminal Cases* (Jan. 17, 2008). The conflict arises where an attorney—typically in a criminal

[3] The Respondents have also suggested that Mr. Mitchell is earning more as a Presiding Officer than he earned when the State last employed him. The BSR will leave it to Mr. Mitchell to comment on whether his present salary, which he receives without benefits, is intended to encompass both the salary and the benefits he received when he last worked for the State.

case—accepts a flat fee for representation and treats the money as earned immediately and deposits it into a general operating account without regard to what work, if any, the attorney has actually done on the case. See id. For example, if a criminal defense attorney accepted a $5,000 flat fee to handle a DUI matter and shortly thereafter is fired, there are ethics issues with taking the entire $5,000 fee where the defense attorney has not actually completed the work to earn it. In order to address the issue, the NHBA Ethics Committee comment to Rule 1.15(d) recommended moving client funds out of the IOLTA account and treating fees as "'earned' only when work of comparable value has been performed." Id. at 2.

This is precisely how Mr. Mitchell treated his arrangement with the State. He was paid a flat fee with a limit of $90,000.00 that he was to earn during the term of his contract, see Ex. B to Respondents' Memorandum at p. 8, but he was not allowed to treat that money as earned until he had actually performed work of comparable value by acting as Presiding Officer, so he was paid incrementally as he worked. This is why Mr. Mitchell turned down the opportunity for a longer contract: he was attempting to avoid the scenario where he had a contract with a large flat fee for a nine month term but he resolved the matter prior to the end of the nine month period. See Ex. A, Pre-Presiding Conference Transcript (Wherein Mr. Mitchell stated that he was "offered a longer contract, and [ ] said, 'Well that won't be necessary.'"). The New Hampshire ethics rules required the payment schedule Mr. Mitchell adopted, and by it he avoided receiving legal fees for work that was not of comparable value. If Mr. Mitchell was discharged or was otherwise unable to complete the case because of, for example, illness, under the Ethics Committee's interpretation of Rule 1.15(d) Mr. Mitchell would not have "earned" the remainder of his contract (his fee). If, however, the case ended because Mr. Mitchell granted dispositive motions, he would have performed work of comparable value to his fee by reviewing the motions and

writing his opinion dismissing the case, and he would have earned his entire fee. Thus, there was no financial incentive for Mr. Mitchell to deny Respondents' dispositive motions. Far from it, had Mr. Mitchell's goal been to simply increase his profit, he could have granted the Respondents' motions, concluded the case, and collected the balance of his salary without having to serve as an active Presiding Officer as he has done in the months since Respondents filed their dispositive motions.

Placed in the context of the recent "flat fee" developments, to the extent that Mr. Mitchell described his arrangement as a flat fee arrangement, he was not misrepresenting anything, but rather using that term accurately as it is understood within the New Hampshire Bar. This was particularly so when Mr. Mitchell used the term with Respondents' legal team, which is comprised of seasoned criminal defense attorneys who should have been aware of the Ethics Committee's 2008 comments on Rule 1.15(d) because it related to flat fees in criminal cases, as well as lead counsel for the LGC, who is an expert in the defense of legal malpractice claims.

There is also no evidence of actual bias in this matter. Respondents complain that Mr. Mitchell attempted to extend the length of the proceedings and increase his compensation by refusing to grant their dispositive motions. There can be no due process violation on this basis because in administrative proceedings of this type there are no rights to file dispositive motions as are provided in Rule 58-A in the New Hampshire Superior Courts or Rules 12 and 56 in the federal courts. To the contrary, the procedures set forth for this type of administrative proceeding specifically provide that "[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." R.S.A. 421-B:26-a, XIX. In other words, by statute, Mr. Mitchell is authorized to simply withhold judgment on the Respondents' dispositive motions until after the evidentiary hearing

concludes. This approach is quite common in administrative proceedings and is within the sound discretion of the presiding officer. Where there is no right to dismissal by motion, there can be no due process violation in a presiding officer's refusal to dismiss a case.

As well, for the Respondents' position to have any validity, every one of their motions involving every challenge to every count of the amended petition would have to have been of substantial merit compelling dismissal of the entire proceeding. In fact, Mr. Mitchell correctly ruled against the Respondents' dispositive motions and the BSR adopts its objections and the rulings thereon by reference herein.

The Respondents' other arguments on this score are similarly unavailingly. They make much of the fact that the Secretary of State was involved in appointing Mr. Mitchell, but by statute that is how Mr. Mitchell must be appointed. See R.S.A. 421-B:26-a, I. With respect to the length of the litigation, it is fundamentally unfair for the Respondents to suggest that Mr. Mitchell is elongating this proceeding to increase his compensation where Mr. Mitchell repeatedly accommodated their requests to extend deadlines, continue hearings, and ultimately postpone the evidentiary hearing by three weeks in order to resolve a conflict in Attorney Saturley's calendar. Indeed, simply removing the extension Mr. Mitchell granted on Attorney Saturley's motion would have allowed the parties to conclude this matter well before May 31, 2012 and removed the need for Mr. Mitchell to extend the term of his contract. Though Respondents suggest that they were unaware of the nature of Mr. Mitchell's compensation during this period, the Pre-Hearing Transcript demonstrates that Mr. Mitchell advised counsel for all moving Respondents of his contractual arrangement and suggested they file a Right to Know request for further details. See Ex. A, Pre-Hearing Transcript.

Finally, Respondents suggest that if Mr. Mitchell does not rule in their favor they will certainly appeal, which would force them to file a motion to reconsider, which will further delay the proceeding and increase Mr. Mitchell's compensation, thereby implying that Mr. Mitchell has a pecuniary incentive to rule against them. Mr. Mitchell, of course, does not control whether or not the Respondents file any pleading, and the Respondents would be well-advised to consider the merits of Mr. Mitchell's orders before committing to an appellate strategy.

Because Mr. Mitchell accurately disclosed his pay arrangement, there is no evidence that he delayed these proceedings in order to increase his compensation or even the appearance that such a thing happened, and because it was and is the Respondents who have caused the delays, the Respondents have failed to rebut the presumption that Mr. Mitchell is acting with impartiality. Appeal of Maddox a/k/a Cookish, 133 N.H. at 182.

3. The legal authority the Respondents rely upon is distinguishable.

The seminal cases on recusal upon which Respondents rely are distinguishable. In Tumey v. Ohio, 273 U.S. 510 (1927), the United States Supreme Court found a due process violation where a defendant was cited, tried, and convicted of a violation of the prohibition laws by a local mayor who was authorized by ordinance to sit as a judge in such cases and only paid out of a portion of the fines imposed on the defendants who appeared before him. Id. at 518-20, 531. If the defendants were not convicted, the judge was not paid. Id. at 520. In other words, in Tumey the judge's pay was directly determined by the number of defendants he convicted and how much he charged them in fines. Similarly, in Ward v. Village of Monroeville, 409 U.S. 57 (1972), a local mayor presided in the traffic court, and the revenue produced from the mayor's court produced a "substantial portion" of the municipality's funds. Id. at 58-59. Applying Tumey, the United States Supreme Court found a due process violation.

Neither Tumey nor Ward control here. Mr. Mitchell's salary is wholly independent of the financial penalty, if any, he chooses to impose on Respondents, so Tumey does not apply. Likewise, the Secretary of State's funds do not come significantly from the financial penalties collected in actions like these since it is acknowledged that this is the first action of its type. Ward is therefore inapposite as well. Thus, neither Tumey nor Ward support recusal in this instance.

Perhaps recognizing that Tumey and Ward are distinguishable, the Respondents begin their memorandum by asserting as a general proposition that pecuniary interest requires *per se* recusal. For this, they cite to Appeal of Grimm, 141 N.H. 719, 721 (1997) (*citing* Plaistow Bank & Trust Co. v. Webster, 121 N.H. 751, 754 (1981)). Examination of this citation reveals a string of decisions that repeat general platitudes regarding pecuniary interest without applying them to the facts, and that lead ultimately back to Tumey and Ward. See Plaistow Bank & Trust Co., 121 N.H. at 754 (*citing* State v. Aubert, 118 N.H. 739, 741 (1978), *citing* Gibson v. Berryhill, 411 U.S. 564, 579 (1973), *citing* Tumey and Ward). Thus, to simply repeat the general principles expressed in Tumey and Ward without identifying any cases other than the distinguishable Haas that actually apply to the facts at bar establish that recusal is required *per se*. Indeed, when it was decided, Tumey recognized that its rule was limited to "procedure[s] which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." 273 U.S. at 532. It is notable from this quote first that it is stated in terms of convictions, which apply only in the criminal context. Cf. Tropp v. Corporation of Lloyd's, 385 Fed. Appx. 36, 38 (2nd Cir. 2010) (distinguishing Tumey in part by differentiating between criminal and civil cases). Recognizing

this limitation, the Supreme Court has interpreted Tumey to apply only where the adjudicator has a "substantial pecuniary interest" in the outcome. Gibson, 411 U.S. at 579. Thus, some courts have read Tumey and Ward not to require *per se* recusal in cases where any pecuniary interest is demonstrated, but merely to excuse a showing of actual bias. See United States v. Heldt, 668 F.2d 1238, 1277 n.83 (D.C. Cir. 1981).

Attempting to draw their general argument to the specifics of this case, the Respondents hang their hat on Haas v. County of San Bernardino, 45 P.3d 280 (Cal. 2002). Haas is distinguishable on its facts. In that case, the plaintiff was the operator of a county-licensed massage parlor in San Bernardino County, California, where one of the masseuses proposed a sexual act to a deputy sheriff and the San Bernardino County Board of Supervisors (the "Board") revoked the plaintiff's license. Id. at 283. The plaintiff appealed the revocation of his license and the Board issued a notice of a hearing on the appeal and identified a local attorney as the hearing officer for the appeal. Id. The plaintiff immediately objected to the County choosing its own attorney to conduct the hearing as a due process violation. Id. The record in Haas indicates the serialized nature of such proceedings. Prior to the hearing that formed the basis for the plaintiff's appeal, there were two other administrative appeals before another hearings officer that were appealed to Board and then the California Superior Court, who twice vacated and remanded the case. Id. at 283 n.3.

At the hearing that formed the basis of the Haas opinion, the plaintiff raised the issue again and the Deputy County Counsel, who was serving as the County's attorney at the hearing, stated on the record that he had personally hired the hearings officer for the hearing. Id. at 283. The Deputy County Counsel then declined plaintiff's invitation to disclose the specifics of the hearing officer's pay. Id. at 284 n.4. County Counsel further explained—again, at the hearing

where the hearings officer was to decide the plaintiff's fate—that he foresaw employing the hearings officer for similar hearings in the future and that he assumed she was aware of that, and that the hearings officer was only paid for hearings she actually conducted. Id. at 284. Further inquiry at the hearing revealed that, although the San Bernardino County Code established an office of County Hearing Officer in order to supply hearings officers for administrative hearings, in reality no "independent department" existed, and hearings officers were chosen on an ad hoc basis as needed for hearings. Id. at 284 n.6, 284-85.

The plaintiff lost his appeal and the matter was appealed all the way up to the California Supreme Court, which concluded that the manner in which the Board selected the hearings officer violated the plaintiff's due process rights because the hearings officer's future income was dependent on the good will of the county attorneys who selected the hearings officer. Id. at 293-94. In reaching this ruling, the California Supreme Court took issue with the San Bernardino system because it involved a process where "income from judging depends upon the volume of cases an adjudicator hears and when frequent litigants are free to choose among adjudicators, preferring those who render favorable decisions." Id. at 290. The California Supreme Court also noted that San Bernardino had failed to follow its own statute establishing an office of hearing officers. Id. at 294.

The foregoing review of the facts and ruling demonstrates the material differences between Haas and the instant proceeding. In Haas, the county attorney chose the hearings officer who would decide his case prior to the hearing, and stated on the record that he would potentially use her again after the Haas matter concluded. Id. at 283. Thus, the factual analog to Haas is not, as Respondents suggest, the Secretary of State's role in selecting Mr. Mitchell. The true factual analog would be the BSR's lead counsel having the power to personally select Mr.

Mitchell, selecting him, and stating on the record that he might select him for other proceedings after this one concluded (and he knew Mr. Mitchell's decision). Once this difference is clear, it may be seen that the Secretary of State's role in selecting Mr. Mitchell for this proceeding is no more nefarious than any administrative agency employing and paying hearings officers to enforce the regulations relevant to that administrative agency. See Asmussen, 145 N.H. at 592 (Wherein the New Hampshire Supreme Court recognized that "[o]n issues of policy and legal interpretation, hearings examiners are subject to the direction of the agency by which they are employed, and their independence is accordingly qualified."). The New Hampshire Supreme Court's recognition that a presiding officer will by definition be charged with enforcing the regulations of the agency is consistent with the enabling language of R.S.A. 421-B, which requires that the Secretary of State either conduct adjudicatory hearings or appoint a presiding officer to do so. See R.S.A. 421-B:26-a, I.[4] Haas is about prosecutors picking the judges and then choosing them again after knowing how they ruled the first time, not about administrative agencies appointing presiding officers.

The Haas case also involved a serialized process where attorneys were repeatedly selected by county attorneys who knew how they had ruled in the last hearing, and it was this process upon which the California Supreme Court focused in finding impermissible pecuniary interest. See id. at 290. The Respondents have not even tried to suggest that there are a series of additional engagements in the offing for Mr. Mitchell if he rules in favor of the BSR in this case. Of course, the Respondents could not make such a suggestion because, as all sides acknowledge, this case is the first proceeding of its type and potential disputes regarding the other two risk

[4] The Respondents do not object to the fact that Mr. Mitchell is not a BSR staff attorney, as the selection of a presiding officer from outside of the BSR was done to forestall claims of inherent bias in this hotly contested case.

practices pools have been resolved by agreement. See BSR Trial Exs. 64 and 65. There is not the "volume of cases" to which the Haas court referred, nor are there "frequent litigants." See 45 P.3d at 290. There is therefore no prospect of future goodwill to influence Mr. Mitchell the way the hearings officer in Haas may have been influenced, and Haas should not apply here.

4. The Respondents waived any claim of impartiality by failing to raise it in October 2011 when the Presiding Officer disclosed his financial arrangement.

The Respondents' case differs from Haas in another material respect. In Haas, the plaintiff raised a due process challenge to the selection of the hearings officer as soon as he received notice of his hearing. 45 P.3d at 283. Here, the Respondents did not object to Mr. Mitchell's participation until the last day of their trial. See HT at 2305. The Respondents' failure to raise this issue when they knew about it is a waiver of their claim. In the case of In re Abijoe Realty Corp., 943 F.2d 121 (1st Cir. 1991), the appellant questioned a bankruptcy judge's impartiality in a motion to vacate a judgment unfavorable to the appellant. Id. at 126. In other words, the appellant waited to raise the issue until after it had the trial court's ruling. The First Circuit found that the appellant had waived the issue, noting that "[i]n general, '[o]ne must raise the disqualification of the ... [judge] at the *earliest* moment after [acquiring] knowledge of the [relevant] facts.'" Id. (*quoting* United States v. Owens, 902 F.2d 1154, 1156 (4th Cir.1990)) (emphasis in original). This rule is consistent with the law in New Hampshire for over a hundred years that "when any cause of recusation or exception to a judge exists" it may be waived "by a defendant who, knowing the existence of just grounds of recusation, appears, and, without objecting, makes defence." Stearns Adm'r v. Wright Adm'r, 51 N.H. 600, 1872 WL 4342, at *8 (1872). The policy rationale for these decisions is simple: it is unfair to allow a litigant to sit on information, allow the parties and the tribunal to carry on with litigation, and then raise the specter of impartiality at the eleventh hour with the benefit of knowing how the proceeding

unfolded. See In re Cargill, Inc., 66 F.3d 1256, 1263 (1st Cir. 1995) (*citing* In re United Shoe, Machinery Corp., 276 F.2d 77, 79 (1st Cir. 1960) ("We cannot permit a litigant to test the mind of the trial judge like a boy testing the temperature of the water in the pool with his toe, and if found to his liking, decides to take a plunge.")).

That is exactly what the Respondents have attempted to do here. They were aware of the nature of Mr. Mitchell's pay arrangement in October of 2011, and to the extent they had further questions they could have filed a "Right to Know" request under R.S.A. 91-A as Mr. Mitchell advised them to do on October 4, 2011. They also should have been aware that the Secretary of State was required to either conduct the hearing himself or appoint a presiding officer to do so. R.S.A. 421-B:26-a, I. Despite having this information, the Respondents did not say anything, repeatedly sought continuances and postponements during the first half of 2012, and did not raise the issue until the final day of a two week trial after they knew Mr. Mitchell's rulings on their dispositive motions and had observed almost the entirety of the adjudicatory proceeding. See HT at 2305. Then, when counsel for BSR offered to compress the post-hearing briefing schedule so that the proceeding could be finished prior to the expiration of Mr. Mitchell's term on May 30, 2012, the LGC's counsel flatly refused. See id. at 2311-12. The Respondents have not followed the First Circuit's directive to "raise the disqualification of the ... [judge] at the *earliest* moment after [acquiring] knowledge," Abijoe, 943 F.2d at 126, and instead waited until the time suited them to broach the issue. The issue should therefore be considered waived.

5. The Respondents proffered approach to recusal is at odds with public policy

Finally, as a matter of public policy, the Respondents motion makes little sense. By statute, the Secretary of State is required to either conduct adjudicatory proceedings himself or appoint a presiding officer to do so. R.S.A. 421-B:26-a, I. In this case, the record demonstrates

that, consistent with statute, the State employed a Presiding Officer on an ad hoc basis to adjudicate a hearing that was the first of its kind, and that Mr. Mitchell took his employment in increments in order to avoid a situation where the State was obligated to pay the remainder of his term even though he had resolved the case. This is government as it should be: the State marshalling scarce resources in order to minimize the cost of what could well be a singular proceeding. By contrast, the Respondents would require the State to maintain a cadre of hearings officers and pay them a flat salary regardless of whether the State conducts any hearings under R.S.A. 421-B in order to avoid the prospect of impartiality, however ephemeral. This would, in essence, reverse the presumption of impartiality to which Mr. Mitchell is entitled, Appeal of Maddox a/k/a Cookish, 133 N.H. at 182, and introduce a system where presiding officers are presumed to be impartial simply because they are paid for their work. Such a system would almost certainly waste taxpayer dollars because it would by definition pay such hearings officers not to work in order to remove the possibility of impartiality when they do work. It would also encourage the filing of more litigation because the existence of the hearings officers would give rise to pressure to use them. Such a system cannot be the result that due process requires.

CONCLUSION

The Presiding Officer should affirm his denial of the Respondents motion for the foregoing reasons.

Respectfully submitted,
The Bureau of Securities Regulation
State of New Hampshire
By its attorneys,
Bernstein, Shur, Sawyer & Nelson, P.A.

Dated this 11th day of June, 2012

/s/ *Andru H. Volinsky*

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Certificate

I hereby swear that the foregoing motion was provided to counsel of record on the below service list electronically, this 11th day of June, 2012.

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