

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No.

In the Matter of Local Government Center, Inc.; Local Government Center Real Estate, Inc.; Local Government Center Health Trust, LLC; Local Government Center Property-Liability Trust, LLC; Health Trust, Inc.; New Hampshire Municipal Association Property-Liability Trust, Inc.; LGC-HT, LLC, Local Government Center Workers' Compensation Trust, LLC

HEALTHTRUST, INC.'S RULE 10 APPEAL FROM NEW HAMPSHIRE  
DEPARTMENT OF STATE, BUREAU OF SECURITIES REGULATION,  
PURSUANT TO RSA 421-B:26-a, RSA 5-B:4-a, VIII, AND RSA 541:6

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HealthTrust, Inc. appeals the Final Order Addressing Remand and the Order Denying Motion for Reconsideration and Denying Stay of Presiding Officer Donald E. Mitchell (collectively, the “Order”) in the matter of Local Government Center, Inc., *et al.*, Case No. 2011000036, before the New Hampshire Department of State, Bureau of Securities Regulation (BSR), pursuant to RSA 421-B:26-a, RSA 5-B:4-a, VIII, RSA 541:6, and New Hampshire Supreme Court Rule 10.

**A. PARTIES AND COUNSEL**

The party seeking review of the Order is HealthTrust, Inc., 25 Triangle Park Drive, P.O. Box 617, Concord, NH 03302-0617. HealthTrust’s counsel on appeal is Michael D. Ramsdell (NH Bar No. 2096), Ramsdell Law Firm, P.L.L.C., 46 South Main Street, Concord, NH 03301.

The other parties and counsel of record are:

Local Government Center, Inc., Local Government Center Real Estate, Inc., Local Government Center Health Trust LLC, Local Government Center Property-Liability Trust LLC, New Hampshire Municipal Association Property-Liability Trust, Inc., LGC-HT, LLC, and Local Government Center Workers’ Compensation Trust, LLC, all of whom are or were located at 25 Triangle Park Drive, P.O. Box 617, Concord, NH 03302-0617. Although these parties were involved in at least the original administrative proceeding, none was involved in the proceeding that resulted in the Order. These parties were represented by various counsel during at least the original proceeding, including Michael D. Ramsdell, Ramsdell Law Firm, P.L.L.C., 46 South Main Street, Concord, NH 03301.

Property-Liability Trust, Inc., 25 Triangle Park Drive, P.O. Box 617, Concord, NH 03302-0617, which was represented by Bruce W. Felmly and Patrick C. Closson, McLane Middleton, P.A., 900 Elm Street, P.O. Box 326, Manchester, NH 03105.

Eight municipalities: the Towns of Salem, Peterborough, Northfield, Temple, Meredith, Plainfield, Bennington and Auburn, that were the Appellants in *Appeal of Town of Salem*, 168 N.H. 572, 575-76 (2016), which resulted in the remanded proceeding and the Order. The municipalities are represented by Attorneys Charles G. Douglas, III, and Richard J. Lehmann, Leonard & Garvey, P.C., 14 South Street, Suite 5, Concord, NH 03301.

The New Hampshire Secretary of State, Bureau of Securities Regulation, 107 North Main Street, Room 204, Concord, NH 03301, which is represented by Bureau Attorneys Barry J. Glennon and Adrian S. LaRochelle, and Attorneys Andru H. Volinsky, Roy W. Tilsley, Ovide Lamontagne, and Christine A. Ferrari, Bernstein, Shur, P.A., 670 North Commercial Street, P.O. Box 1120, Manchester, NH 03105.

**B. ORDERS SOUGHT TO BE REVIEWED (SEE APPENDIX)**

1. Final Order Addressing Remand (October 7, 2016)
2. Order Denying Motion for Reconsideration and Denying Stay (November 21, 2016)

**C. QUESTIONS PRESENTED FOR REVIEW**

1. Whether the Order is unsupported by the evidence, unjust or unreasonable because, although the record contains ten instances in which HealthTrust provided advance notice to the BSR of its plan to distribute surplus funds or requested guidance from the BSR regarding such distribution, the Presiding Officer found that HealthTrust failed to notify the BSR of its distribution plan and therefore the BSR did not waive a challenge to HealthTrust's distribution of \$17.1 million in surplus?

2. Whether the Presiding Officer committed an error of law when he expanded the scope of the remanded proceeding from the eight Towns' claim for \$278,578 to include claims raised by the BSR in the amount of more than \$2 million on behalf of sixty-six other former and current HealthTrust members that did not participate in the administrative proceeding?

3. Whether the Presiding Officer committed an error of law when he ruled that former members that contributed to the \$17.1 million surplus between 2003 and 2010 had a statutory right to participate in the distribution?

4. Whether the Order is unjust and unreasonable because the Presiding Officer imposed a penalty against HealthTrust in an amount of more than \$2.3 million after HealthTrust distributed the \$17.1 million surplus consistent with the Presiding Officer's prior orders, the BSR's approved method for distributing surplus, and the BSR's previously recommended distribution plan for the \$17.1 million?

**D. STATUTORY PROVISIONS INVOLVED IN THE CASE (SEE APPENDIX)**

RSA 5-B:4-a, RSA 5-B:5, RSA 421-B:26-a, and RSA 541:6

**E. RELEVANT CONTRACTS (SEE APPENDIX)**

1. BSR's Risk Pool Practices Agreement with New Hampshire Public Risk Management Exchange

2. BSR's Risk Pool Practices Agreement with New Hampshire School Health Care Coalition

**F. STATEMENT OF THE CASE**

HealthTrust appeals the Order that concluded an administrative proceeding that followed this Court's remand in *Appeal of Town of Salem*, 168 N.H. 572 (2016) (the "Salem case"). The Salem case was the result of an administrative proceeding on remand from this Court's decision in *Appeal of Local Government Center, et al.*, 165 N.H. 790 (2014). The relevant facts predating the most recent administrative proceeding were summarized by this Court in the Salem case:

In 2011, the secretary of state commenced an adjudicative proceeding prompted by a staff petition filed by the Bureau alleging that the administrative respondents had violated RSA chapters 5-B and 421-B. The presiding officer issued an order on August 16, 2012 (the August 16 Order) ruling that the administrative respondents had violated several provisions of RSA chapter 5-B, including RSA 5-B:5, I(c), which provides, in pertinent part:

I. Each pooled risk management program ... shall:

....

(c) Return all earnings and surplus in excess of any amounts required for administration, claims, reserves, and purchase of excess insurance to the participating political subdivisions.

The August 16 Order required that Health Trust and Property Liability Trust return excess funds of \$33.2 million and \$3.1 million, respectively, to those political subdivisions that were members of those programs on August 16, 2012. The August 16 Order also directed the Bureau and the administrative respondents to enter into an “agreed-upon plan” to distribute excess funds to members that had participated in the program at any time after June 10, 2010; however, if those parties failed to reach an agreement, the order required distribution only to Health Trust's and Property Liability Trust's current members. The parties failed to reach agreement, and the excess funds were ordered to be distributed to current members.

The administrative respondents appealed the August 16 Order to this court. We affirmed in part, vacated portions of the order not relevant here, and remanded for further proceedings. Thereafter, the Bureau filed a motion for entry of default order against the administrative respondents alleging noncompliance with the August 16 Order. The issues related to that motion were resolved by a consent decree incorporated into the presiding officer's order. During that proceeding, the Towns were permitted to intervene in order to be heard on their proposal to participate, as former members of Health Trust, in the further distribution of approximately \$17.1 million in excess funds. Their motion proposing such a distribution was denied, and the Towns now appeal.

*Appeal of Town of Salem*, 168 N.H. at 575-76 (citations omitted).

The Court explained that “RSA 5–B:4–a authorizes the secretary of state to impose penalties for violations of the statute's provisions - here violation of RSA 5–B:5, I(c) - by means including ‘[r]escission, restitution, or disgorgement.’” *Id.* at 580 (citing RSA 5–B:4–a, I(b)(2)).

The Court thereafter found a remand necessary because, although the Presiding Officer found restitution or disgorgement appropriate:

to the extent the presiding officer concluded that he lacked the authority to penalize a violation of RSA 5–B:5, I(c) by ordering payment to former members of a pooled risk management program as either restitution or disgorgement, he committed an error of law. Accordingly, we vacate the presiding officer's decision and remand for further proceedings. We note that our decision merely clarifies the scope of the secretary's authority under RSA 5–B:4–a; we express no opinion as to what penalty

should be ordered in this case.

*Appeal of Town of Salem*, 168 N.H. at 580-81 (citations omitted).

On remand, the Presiding Officer did not merely consider the evidence presented in the previous administrative proceeding pursuant to the correct legal standard and adjudicate the intervening Towns' aggregate total claim for \$278,857. Instead, although this Court had acknowledged that the BSR's claims had been resolved by a Consent Decree incorporated into a final order,<sup>1</sup> *Appeal of Town of Salem*, 168 N.H. at 575-76, the Presiding Officer allowed the BSR to expand the scope of the remand to include an additional more than \$2 million that the BSR asserted on behalf of sixty-six entities that had not participated in the administrative proceeding or the Towns' appeal.

When HealthTrust argued that the BSR had waived those claims through the Consent Decree and Final Order on Remand, or that they were barred by the doctrine of res judicata, the Presiding Officer rejected the argument and found that the BSR could not have waived a challenge to HealthTrust's distribution of \$17.1 million in surplus because HealthTrust failed to notify the BSR of its distribution plan. In its motion for reconsideration, HealthTrust cited ten instances in the record in which it notified the BSR of its plan to distribute the surplus funds or requested guidance from the BSR regarding that planned distribution. The Presiding Officer denied HealthTrust's motion without comment on the citations to the record.

The Order misconstrues this Court's clarification of the Secretary's statutory enforcement authority pursuant to RSA 5-B:4-a as creating a statutory right for former risk pool members to share in a distribution of surplus. The Presiding Officer erroneously found "that the Court's decision gives breadth to all political subdivisions now determined to have a statutory right to

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<sup>1</sup> The Final Order on Remand stated: "No further action by any party to these administrative proceedings shall be pursued as to all issues contained within the initial amended BSR petition dated September 2, 2011."

receive a proportionate share of the illegal amount of subsidy made by HT to support . . . Property-Liability Trust, Inc. (PLT).” When HealthTrust argued that the creation of such a statutory right was an error of law, HealthTrust’s motion for reconsideration was denied without comment on the argument.

HealthTrust also argued in its motion for reconsideration that it is unreasonable and unjust for its regulator to order HealthTrust to pay an additional \$2.3 million when: (1) advance notice of its distribution plan for the \$17.1 million was provided to the BSR and the Presiding Officer; and (2) the distribution methodology was consistent with the Presiding Officer’s prior orders, the BSR’s previous recommendation to the Presiding Officer, and the BSR’s agreements with other risk pools. The Presiding Officer did not comment on the argument.

**G. JURISDICTIONAL BASIS FOR APPEAL**

The jurisdictional bases for this appeal are RSA 421-B:26-a, RSA 5-B:4-a, VIII, RSA 5-B:5, I(c), and RSA 541:6.

**H. REASONS FOR ACCEPTING THE APPEAL**

There are substantial differences of opinion between the regulator, the BSR, and its regulated risk pool management program, HealthTrust, regarding the questions presented in section C above. Acceptance of the appeal would protect HealthTrust and its political subdivision members from substantial or irreparable injury. Acceptance of the appeal also would present an opportunity for the Court to clarify two issues of importance to the administration of justice. The first is the scope of this Court’s remand to an administrative agency following an error of law. The second is whether the Secretary’s enforcement authority pursuant to RSA 5-B:4-a creates statutory rights for former members of pooled risk management programs.

The injury to HealthTrust and its political subdivision members is substantial, and potentially irreparable. The penalty imposed by the Presiding Officer requires HealthTrust to

expend a substantial amount of its political subdivision members' funds, more than \$2.3 million. Therefore, those funds will not be available as reserves to protect the political subdivisions in the event of emergencies or when the actual costs of claims exceed the levels actuarially predicted.

The issues regarding the scope of this Court's remand and whether the Court created a new statutory right for RSA 5-B pooled risk management program members are equally important. The Towns' appeal involved a claim by eight municipalities in the aggregate amount of \$278,857. This Court remanded the matter because of an error of law. The Presiding Officer should have considered the evidence presented in the previous administrative proceeding pursuant to the correct legal standard. Instead, he allowed the BSR to present new evidence in support of additional claims (even though the BSR had previously resolved all of its claims in the proceeding via a Consent Decree and the Final Order on Remand) in excess of \$2 million greater than the Towns' claims, on behalf of 66 entities that did not participate in the administrative proceeding or the appeal. The expansion of the remand was an error of law, as well as unjust and unreasonable. The Presiding Officer's creation of a new statutory right to impose a repayment obligation on HealthTrust when the Court only clarified the Secretary of State's authority to impose remedies for a statutory violation also is an error of law.

In short, if the Court declines to accept this appeal, the Presiding Officer's errors of law, and unjust and unreasonable Order will not be corrected. HealthTrust and its political subdivision members will be harmed. Additionally, an opportunity to advance the administration of justice will be lost.

#### **I. STATEMENT OF PRESERVATION OF THE ISSUES**

HealthTrust's counsel certifies that every issue raised herein was presented to the Presiding Officer, and was preserved for appellate review by a properly filed Motion for Reconsideration.

**J. CONCLUSION**

For the reasons stated above, HealthTrust requests that this Court accept this appeal, and direct the submission of briefs and the scheduling of oral argument.

**K. CERTIFICATION OF SUBMISSION OF ORDERS AND PLEADINGS**

HealthTrust’s counsel certifies that copies of the Orders from which relief is sought, and the motion for reconsideration and objections thereto are submitted as part of the Appendix to this Rule 10 Appeal.

Respectfully submitted,  
HEALTHTRUST, INC.


By its counsel,

Dated: December 6, 2016

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**CERTIFICATE OF SERVICE**

I certify that on the 6th day of December, 2016, I filed an original and eight printed copies of this Rule 10 Appeal and the Appendix thereto (collectively, this “pleading”) with the New Hampshire Supreme Court, forwarded one copy of this pleading via U.S. mail and e-mail to all counsel of record, forwarded two copies of this pleading to the New Hampshire Bureau of Securities Regulation, and forwarded one copy of this pleading to the New Hampshire Department of Justice.

  
Michael D. Ramsdell