THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT

In re Petition of McCarthy

INS 13-038-AP

Objection to Anthem Blue Cross/Blue Shield's Motion to Dismiss

Margaret McCarthy objects to Anthem Blue Cross/Blue Shield's Motion to Dismiss as follows.[1]

Anthem's Motion to Dismiss Seeks to Relitigate Issues That The Department Has Duly Considered And Ruled Upon, and a Motion to Dismiss Is Improper At This Stage.

1. Anthem's Motion to Dismiss asks the Department's Hearing Officer[2] to rule that Ms. McCarthy's Petition was untimely, and that she has no standing to seek an adjudicatory hearing under RSA 400-A:17, II.

Timeliness

2. Regarding timeliness, Anthem simply recapitulates its various arguments from what it calls its "April 2014 Rehearing Submission," arguing that the Department erroneously concluded that a thirty day time frame for filing a

[1] Ms. McCarthy received the Motion to Dismiss by email on the morning of May 7, 2014, one day before the Motion was to be adjudicated by the Commissioner prior to the hearing set for May 14, 2014 in this matter. It should be noted that at the time, she was in the process of responding to a Motion in Limine filed by the Department by email the night before. Although the Motion to Dismiss is, for the reasons she further articulates herein, without merit and improperly filed, she nevertheless is obligated to draft and submit a proper objection to preserve her rights. Therefore, to the extent that the Department deems the filing of this Objection to be untimely, she requests that the Department waive the timeliness requirements governing her response to the Motion to Dismiss for reasons of justice and equity.

[2] In prior filings, Ms. McCarthy has referred to the adjudicative body in this proceeding as "the Department." Because the Department is represented in this matter by Mr. McCaffrey, these pleadings will henceforth refer to the "Hearing Officer" when addressing the adjudicative body, and the "Department" when addressing the Department's actions that have been challenged, or the Department's arguments in these proceedings.

Petition under RSA 400-A:17 commenced only when Ms. McCarthy knew or should have known that she would be aggrieved by the Hearing Officer's decision.

3. In coming to that conclusion, the Hearing Officer correctly observed the tension between the timeliness requirement of RSA 400-A:17, and the unique facts and circumstances of this case—which were that neither the substance of the Department's actual decision,[3] nor the procedure relied upon in coming to that decision, nor the evidence considered in arriving at that decision were ever publicized. RSA 400-A:17, II contemplates a scenario where the department has conducted some public action, and issued an order or other notice, together with a basis for its action, that a reasonable member of the public can review and challenge. In this instance, the only public notice of the "decision" was an August 1, 2013 press release that contained no details at all about the substance of the QHPs, no indication that Anthem was the sole provider of QHPs on the Exchange, no assessment of network adequacy that a member of the public could respond to. Given these serious issues of transparency, and the delay they created in providing any notice to the public as to what the Department's decision actually was, the Hearing Officer was obligated to reconcile the timeliness requirements of RSA 400-A:17 with the reality that *no one*, other than Anthem and the Department, had any notice of the substance of the Department's July 31, 2013 decision within 30 days of July 31. In fact, despite Anthem press releases and concerned inquiries by legislators, no one authoritatively knew what the Department's decision entailed until the Exchange went "live" on October 1, 2014.

[3] Assuming, for the sake of this Motion, that the Department was correct in assigning July 31, 2013 as the date of its "decision" approving Anthem's narrow network plan as a QHP under the ACA.

4. As Ms. McCarthy stated in her affidavit on the subject of timeliness, she began to hear press reports about a restrictive network that might not include her doctors in September. Affidavit of Margaret McCarthy, April 15, 2014 (previously submitted and incorporated herein by reference). When she called Anthem to inquire about this in September, she was told by Anthem's customer service staff that the narrow network would not affect her due to the fact that she could continue her existing Anthem coverage. *Id*. Therefore, to the extent that Ms. McCarthy can be said to have had knowledge of the substance of the narrow network prior to October 9, 2013, when she received a letter from Anthem telling her that her existing policy would be cancelled and that she would need to purchase a policy on the Exchange, Anthem's own statements to her discouraged her from finding out more about the nature of Anthem's network.

5. All of which is restated from prior pleadings merely to underscore the propriety of the Hearing Officer's decision in reconciling what is, plainly, an unusual and troubling set of circumstances.[4]

6. Anthem's reliance upon RSA 508:4, I for the proposition that the "discovery rule" does not apply unless enacted by statute is misplaced. While RSA 508:4, I is certainly a statutory provision, the "discovery rule" in question is a common law precept of ancient origins. *Bailey v. Glover*, 88 U.S. 342, 347-49 (1874).

> And we are also of opinion that [the "discovery rule"] is founded in a sound and philosophical view of the principles of the statutes of

[4] Had the Department actually conducted public hearings on Anthem's narrow network, or at least made the process, submissions and considerations of the Department with regard to approving the narrow network public from the start, and issued an order with due public notice that adequately provided notice of the substance and basis of the Department's decision, Anthem's position would have substantially greater merit.

> limitation. They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.

Id. at 349. Thus, while RSA 400-A:17 is a legislative enactment setting forth an administrative procedure, the Hearing Officer properly applied the "discovery rule" under the facts in question, to resolve an obvious problem of lack of notice to the public of the Department's original decision and/or act. *See Schoof v. Nesbit*, 316 P.3d 831, 843-44 (Mont. 2014) (noting application of common law "discovery rule" even to statutes of limitation duly enacted without "discovery rule" language) (and cases cited).

7. The Hearing Officer's decision regarding timeliness was proper and final, and Anthem makes no new arguments here that require reconsideration of it.

Standing

8. In support of its request regarding standing, Anthem simply "incorporates here and makes its arguments demonstrating Petitioner McCarthy does not have standing [that it made previously in this proceeding.]" Motion at 7. That is the sum total of its argument—it raises no new law or issues.

9. These questions have been asked and answered. Anthem and Ms. McCarthy exchanged extensive briefing on the question of standing, starting with Anthem's initial objections to her Petition and concluding, finally, with the

Department's Orders of April 4, 2014. *See*, also, Order of April 30, 2014 (ruling that Ms. McCarthy's Petition was timely filed).

10. During the course of these proceedings, Anthem made comprehensive, detailed and well-supported arguments concerning its position on each of the issues of timeliness and standing. It moved for rehearing, as it was entitled to, when the Department did not rule in its favor. Its position has been thoroughly and aggressively litigated, and the matter has been decided. Ms. McCarthy should not have to litigate these questions once again—especially given that Anthem does not even present any new argument or theory.

11. At this stage, Anthem's procedural recourse is an appeal after the hearing has been held. RSA 400-A:24, I. There is no basis at this time for dismissal, the filing of this Motion was duplicative, unnecessary and procedurally improper, and it should be denied.

As A Consequence Of Having To Relitigate Issues That Have Been Resolved Conclusively, Ms. McCarthy Is Entitled to Her Attorneys' Fees And Costs.

12. Ms. McCarthy has now been required to respond yet again to legal arguments that have been made and decided twice already. She is entitled to her fees and costs in preparing the response to Anthem's Motion. *E.g.*, *Adams v. Bradshaw*, 135 N.H. 7, 16 (1991) (noting propriety of fee award "[as] compensation for those who are forced to litigate in order to enjoy what a court has already decreed[.]") (quoting *Keenan v. Fearon,* 130 N.H. 494, 502 (1988)); *Indian Head National Bank v. Corey*, 129 N.H. 83, 86 (1986).

WHEREFORE, for the foregoing reasons, Ms. McCarthy requests that the Hearing Officer:

A. Deny Anthem's Motion to Dismiss;

B. Award Ms. McCarthy her attorneys' fees and costs associated with responding to this Motion; and

C. Grant such other and further relief as the Hearing Officer believes to be just and equitable.

Respectfully submitted,

Margaret McCarthy

By her attorneys,

May 7, 2014

By: /s/ Jeremy D. Eggleton

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