

THE STATE OF NEW HAMPSHIRE

INSURANCE DEPARTMENT

In re Petition of Margaret McCarthy

Docket No. INS 13-038-AR¹

MOTION FOR REHEARING
BY ANTHEM BLUE CROSS AND BLUE SHIELD

Pursuant to New Hampshire Revised Statutes Annotated (“RSA”) 541:3 Motion For Rehearing, Anthem Blue Cross And Blue Shield (“Anthem”) hereby moves the Commissioner for a rehearing in connection with the New Hampshire Insurance Department’s March 28, 2014 Order And Notice Of Hearing (“Hearing Order”), but only insofar as it pertains to the standing of Petitioner Margaret McCarthy (“Ms. McCarthy”)² because, as discussed herein, the Hearing Order in that regard is unlawful and unreasonable under RSA 541:3.

As required by RSA 541:3, this Motion For Rehearing is submitted within 30 days of the Hearing Order and therefore it is timely. As a party “directly affected” by the Hearing Order, Anthem is expressly entitled to seek a rehearing under RSA 541:3³ because the

¹ Although Anthem makes note that, in the Hearing Order, the Docket Number has been changed to INS 13-038-AP (presumably because the matter is being considered a contested case going forward), this Motion For Rehearing is directed at the Hearing Order itself granting Petitioner McCarthy’s standing to challenge network adequacy.

² The Hearing Order addresses the standing of Petitioner McCarthy to seek the relief set forth in the November 6, 2013 Petition For Hearing Pursuant To RSA 400-A:17 (“Petition”) by way of an adjudicative hearing under Section II of RSA 400-A:17.

³ RSA 541:3 states in pertinent part that an affected party, like Anthem, may apply for a rehearing “in respect to any matter ... covered or included in the Order ...” As such, Anthem seeks a rehearing insofar as the Hearing

Hearing Order grants Petitioner McCarthy “standing to challenge the adequacy of Anthem’s network” on the New Hampshire Exchange and schedules an adjudicative hearing for April 9, 2014, thereby forcing Anthem to incur time and expense to defend against the claims being asserted by Ms. McCarthy; exposing Anthem to a potential finding that its Pathway Network is inadequate; and putting it at risk of a potential enforcement action by the Department under Ins 2701.10.⁴

There is good reason for the Department to grant this requested rehearing as follows:

I. THE HEARING ORDER MISTAKENLY FAILS TO ADDRESS ANTHEM’S ARGUMENTS AS TO THE UNTIMELINESS OF THE PETITION AS IT PERTAINS TO PETITIONER MCCARTHY AND FAILS TO MAKE THE REQUISITE STATUTORY DETERMINATION AS TO TIMELINESS OF THE PETITION

1. The Hearing Order Fails To Make A Required Finding As To The Timeliness Of The November 6, 2013 Petition For Hearing.

Pursuant to § II (b) RSA 400-A:17 Hearings, the Commissioner may hold an adjudicative hearing “upon written application for a hearing by a person aggrieved by any ... Order of the Commissioner”, but only if he first “finds that the application is timely ...”⁵

Order failed to rule on the timeliness of Petitioner McCarthy’s claims in the Petition and its finding that Petitioner McCarthy has standing to challenge the adequacy of Anthem’s Pathway Network.

⁴ The fact that the Hearing Order directly affects Anthem is further acknowledged and demonstrated by the fact that the Order expressly states that Anthem has the right to file a motion to intervene for purposes of being granted party status at the hearing. See Order at paragraph 9 on page 7 of 8.

⁵ See § IV of RSA 400-1:17. The timeliness of the Petition as well as the failure of both Petitioners to establish that their Petition was timely is discussed at length in all of Anthem’s submissions regarding Ms. McCarthy’s standing: (1) Brief of Anthem Blue Cross And Blue Shield Re: Aggrievement dated December 2, 2013; (2) Supplemental Brief by Anthem Blue Cross And Blue Shield Re: Aggrievement, including attachments, dated December 11, 2013; (3) January 15, 2014 email of Anthem Senior Legal Counsel opposing any rehearing based on the fact that the Petitioner’s Request For Rehearing dated January 10, 2014 did not even address the specific deficiencies in the Petitioner’s claims of aggrievement set forth in the Department’s December 11, 2013 Order, let alone raise any new bases for reconsideration; and (4) Anthem’s Second Supplemental Brief by Anthem

The Hearing Order is unlawful and unreasonable because it does not make any specific threshold finding that the Petition was in fact timely, as is required by New Hampshire law. A rehearing is required for the Commissioner to make the requisite determination on the timeliness of Ms. McCarthy's Petition.

2. Contrary To The Hearing Order, Anthem Challenged The Timeliness Of The November 6, 2013 Petition In Its Entirety, Not Just As To Petitioner Frisbie.

Although the Hearing Order correctly states at page 3 of 8 that "Anthem also asserts the Petitioners' claims are time-barred", it thereafter mistakenly states in Footnote 3 on page 4 of 8 that "Anthem's arguments about untimeliness relate only to Petitioner Frisbie, not to Petitioner McCarthy." To the contrary, it is clear in all of Anthem's Standing Submissions that its challenge to the timeliness of the Petition is directed at the claims of both Petitioners, not just Frisbie.⁶ For example, in its initial December 2, 2013 Brief, Anthem states unequivocally at page 1: "As a preliminary matter ... it should be noted that

Blue Cross And Blue Shield Re: Aggrievement dated March 11, 2014, (collectively herein "Anthem's Standing Submissions"). To be timely, § III of RSA 400-A:17 expressly states, any Petition for an adjudicative hearing under RSA 400-A:17, II (b), "must be filed with the Commissioner within 30 days after such person knew or reasonably should have known of" the Order being complained of. See, also, the text at page 2 of the Department's December 11, 2013 Order and Footnote 1 of the Hearing Order.

⁶ In fact, the December 11, 2013 Order, which concluded that neither Petitioner has standing, correctly stated in pertinent part in Footnote 4 on page 6 that "[b]oth of Anthem's briefs...address the issue of the timeliness of the Petition." Of note, it would seem that this misunderstanding on the Department's part as to the scope of Anthem's challenge to the Petition's timeliness is similar to the disagreement over the specifics of the claims in the Petition that led to the Commissioner, in his January 17, 2014 Ruling On Request For Rehearing, to grant a rehearing ("I disagree with Petitioners' contention that their original Petition alleged that the Anthem plans do not meet network adequacy standards. Nevertheless, Petitioners are now clearly making this allegation, and, in the interest of procedural fairness, I am persuaded by Petitioner' assertion that they should have the opportunity to make further arguments and factual assertions the issue of standing...") See January 17, 2014 Ruling at pages 1-2). If the Department was under the mistaken impression that the challenge was directed at Petitioner Frisbie only, Anthem would respectfully submit that the same interest in procedural fairness should dictate that a rehearing is in order at this time, as this argument was clearly set forth in its Standing Submissions.

the Petition itself is clearly time-barred under § III of RSA 400-A:17 and should be denied on that basis alone.”; and in its December 11, 2013 Supplemental Brief, Anthem states in pertinent part:

“It is glaring that none of the Petitioners’ three filings with the Department identify a date, by which, they acknowledge, they knew or reasonably should have known that Anthem’s decision not to contract with Frisbie – followed by the Department’s Decision – meant that Frisbie would not be participating in Anthem’s Pathway Network ...”
(Supplemental Brief at page 2).

Also, in its Supplemental Brief, Anthem states that “[i]n their Petition, the Petitioners are very specific in setting forth the key dates and deadlines through the time of the Department’s August 1, 2013 press release, but from there, the **Petitioners curiously become imprecise as to time and what they knew when ...**” (Supplemental Brief at pages 2-3). Of course, as the September 18, 2013 Union Leader news article referred to by the Commissioner in Footnote 3 on page 4 of the December 11, 2013 Order establishes, as of mid-September, 2013, it was well publicized in the New Hampshire media that Petitioner Frisbie was not included in Anthem’s Pathway Network. Further, in its Supplemental Brief, Anthem states that “[t]he Petitioners’ December 2, 2013 **Proof Of Standing filing was devoid of any specifics about the timeliness of the Petition ...**” (Supplemental Brief at page 3); and finally that

“[i]n summary, nowhere in any of the Petitioners’ filings do they provide any guidance to the Department – let alone evidence – as to what and when they knew about Anthem’s decision not to contract with Frisbie for its Pathway Network and the subsequent July 31, 2013 issuance of the Department’s Decision at issue here. Under these

circumstances, Anthem submits that **it would be reasonable for the Department to infer that the Petitioners became aware of both Anthem's decision and the Department's Decision on or about August 1, 2013** when the Department's press release was issued ..." (Supplemental Brief at page 4).

Petitioner McCarthy never challenged or refuted any of these arguments that the entire Petition was time-barred. Anthem's Standing Submissions clearly demonstrate that its challenge has always been to the timeliness of the Petition as a whole, including as it relates to Ms. McCarthy's claims. A rehearing is required for the Commissioner to make the determination on the timeliness of Ms. McCarthy's Petition, as required by RSA 400-A:17.

3. The November 6, 2013 Petition Was Untimely On Its Face.

The Petition was filed with the Department on November 6, 2013 – some eighty-four (84) days after the release and publication of the Department's July 31, 2013 Decision being challenged by the Petitioners. Consequently, it is indisputable that, in the absence of some reasonable explanation by each of the Petitioners as to why it was filed so late, the Petition was fatally untimely under § II (b) of RSA 400-A:17. The administrative record contains no evidence from any source that would permit the Commissioner to conclude that the Petition, including the claims by Petitioner McCarthy, were filed timely. A rehearing is required for the Commissioner to make the requisite finding as to the timeliness of Ms. McCarthy's Petition.

4. Petitioner McCarthy Provided No Testimony Or Other Probative Information That Demonstrates That The November 6, 2013 Petition, As It Pertains To Her, Was Timely Under New Hampshire Law.

As discussed hereinabove, despite the fact that the Petition was untimely on its face and despite multiple opportunities during the extensive briefing on the Petition, Petitioner McCarthy never provided a scintilla of evidence⁷ supporting a finding by the Commissioner that the Petition, as it pertains to her, was filed within 30 days of the date when she knew or should have known about the Decision she was challenging (and its alleged adverse impact on her). In fact, in the face of Anthem's clear and unequivocal challenge to the timeliness of her Petition in each of its Standing Submissions, Ms. McCarthy's knowing decision to forego submitting a simple Affidavit and/or other evidence attesting to the date by which she first learned of the Department's Decision and the

⁷ Of particular note, the Affidavit submitted by Petitioner McCarthy in support of the Petitioners' December 2, 2013 Proof Of Standing Brief did not address the timeliness of the Petition at all. Likewise, at no time thereafter, including in connection with the Petitioners' December 6, 2013 Brief, Ms McCarthy's comments at the February 10, 2014 public hearing; and in the Petitioners' February 18, 2014 Supplemental Brief, did Ms. McCarthy provide any testimony that supports a finding that her Petition was timely under New Hampshire law. There simply was no evidence provided at all.

It is particularly telling that, even after Anthem filed its December 11, 2013 Supplemental Brief, which spelled out the untimeliness argument, and after the filing of its March 11, 2014 Second Supplemental Brief, which yet again addressed the untimeliness of the Petition, Ms. McCarthy chose to forego any further submissions and her counsel of record reported to the Department that it could proceed to rule on the Petition. It is indisputable that, on its face, the Petition, which seeks to challenge the Department's July 31, 2013 Decision, is untimely, as it was filed some 84 days later, not within 30 days, as required by RSA 400-A:17.

To be certain, the fact that Anthem focused its supplemental arguments regarding untimeliness on Petitioner Frisbie's claims in its final Brief does not in any way change the fact that, throughout its Standing Submissions, Anthem challenged the timeliness of the Petition in its entirety, including as it pertained to the claims of Petitioner McCarthy. Specifically, since Ms. McCarthy provided no information or testimony that would permit the Department to make a finding that the Petition was filed within 30 days of the date she "knew or reasonably should have known" of the Department's July 31, 2013 Decision, the Petition on its face was untimely, as it pertains to Petitioner McCarthy, and there was no reason for Anthem to address that issue further in its subsequent filings.

exclusion of Frisbie from the Pathway Network is tantamount to an admission that she was so aware of those facts more than 30 days before the actual November 6, 2013 filing of the Petition. Her failings in this regard should be dispositive that her Petition was untimely and should not be considered.

II. THE HEARING ORDER ERRONEOUSLY FINDS THAT PETITIONER MCCARTHY HAS STANDING

Anthem also respectfully submits that the Commissioner should reconsider the determination that Petitioner McCarthy has standing for the purpose of securing an adjudicative hearing in connection with her claims in the Petition. The reversal of the original finding that Ms. McCarthy was not aggrieved is not sustainable for the following reasons:

In the Hearing Order, at page 3 of 8, the Commissioner affirms, readopts and incorporates the majority of his findings from his initial December 11, 2013 Order, including his prior determinations that (1) the network adequacy standards do not require an insurance carrier, like Anthem, to contract with any particular medical provider, like Frisbie; (2) the network adequacy standards do not require that any particular enrolled participant, like Petitioner McCarthy, have access to any particular provider, like Frisbie; and (3) to prove "injury in fact" in the context of an administrative appeal, a person must show that the action being challenged has or will have a direct effect on the person's legally protected interest. The Hearing Order at page 4 of 8 goes on to verify that an insurer's decision not to contract with a particular medical provider is not subject to review by the Department and that the Department has no authority to regulate competition between medical providers, and

thereafter at page 6 of 8, the Hearing Order acknowledges that the Department cannot order Anthem to contract with Frisbie, even if [Ms. McCarthy] succeeds in demonstrating that Anthem's network is inadequate without Frisbie.

Against this backdrop, the Department cannot lawfully and reasonably find that Petitioner McCarthy has standing. In reversing the original standing denial, the Commissioner states, at page 5 of 8, his agreement with the Petitioners' assertion that the "passage of the ACA makes a difference with respect to the policyholders' interest in the adequacy of Anthem's network." However, the "Petitioners' assertion", to which the Hearing Order refers above (see paragraph 16 at page 9 of the Petitioners' February 18, 2014 Brief, which states: "Because consumers are under a mandate to purchase health insurance, the transaction is very different from the pre-ACA purchase of an HMO plan") was not made in connection with any argument relating to Petitioner McCarthy's eligibility for a subsidy. In fact, Petitioner McCarthy did not make any argument in any of her submissions, let alone did she submit any legal authority, that her potential qualification for a subsidy in any way constituted a legally protected right. In this same regard, the Hearing Order correctly does not go on to find that this post-ACA difference that is perceived by the Petitioners rises to the level of a legally protected interest. In fact, any reliance on such a proposition for purposes of determining the question of Ms. McCarthy's claim of standing would be misplaced because there is no federal or New Hampshire law that supports a claim that potential eligibility for a subsidy under the ACA creates a legally protected interest for purposes of RSA 400-A:17. Consequently, even if it were to be assumed, *arguendo*, that Ms. McCarthy's

opportunity to apply for and attempt to qualify for a subsidy has been impacted, it does not constitute any injury in fact to a legally protected interest sufficient to establish standing under New Hampshire insurance law. Further to this point, it is indisputable that, if she were actually determined to be eligible by the Federally Facilitated Marketplace (“FFM”), Ms. McCarthy could have gone to the FFM and received her subsidy at any time from January 1, 2014 on. Given that the only reason she has provided for not doing so to date is her preference to maintain Frisbie as her medical provider, and given that the Department’s Orders have made it clear that guaranteeing such relief is beyond its authority, there is no identifiable obstacle to Ms. McCarthy exercising her opportunity to secure a subsidy that an adjudicative hearing can remove.⁸

Finally, as set forth in Paragraph 21 of the Petition, and as pointed out in Footnote 2 on page 2 of Anthem’s March 11, 2014 Second Supplemental Brief, Petitioner McCarthy specifically seeks **“an Order from the Department requiring Anthem to permit Frisbie to participate in its marketplace available QHPs according to the same terms and conditions as other providers”**.⁹ (Emphasis added). In the end, by her own statements and submissions, the only relief that will satisfy Petitioner McCarthy and provide her with the

⁸ Ms. McCarthy’s lack of a legally protected interest that has been injured is further demonstrated because, as is set forth in Anthem’s Standing Submissions, Ms. McCarthy has had coverage options other than just the two discussed in the Hearing Order---e.g., she had the option of early renewal of her existing Anthem policy and the option of securing coverage from another insurer off the Exchange that would have enabled her to continue to secure services from Frisbie.

⁹ Ms. McCarthy’s primary focus has been on her argument that she should be allowed to continue to access covered services at Frisbie. See, e.g., the November 20, 2013 Foster.com new article entitled “Medical Muddle: Anthem subscriber says she may just skip insurance and pay Frisbie doctors directly” at the following link: http://www.fosters.com/apps/pbcs.dll/article?AID=/20131120/GJNEWS_01/131129946.

result she seeks by way of an adjudicative hearing is if Anthem were to contract with Frisbie in connection with its Pathway network---relief that the Department has determined it cannot provide. Specifically, as the Commissioner reaffirmed in the Hearing Order, the Department does not have the authority to provide the requested remedy and as such, the Commissioner's determination in the December 11, 2013 Order is not disrupted by anything that was raised by the Petitioners in their rehearing briefs and that determination still holds true now: "[E]ven if the Department's network adequacy review violated the insurance code in some substantive respect ... the Department has no authority to order Anthem to contract with any particular provider ... [network adequacy] standards do not require that Anthem contract with any particular provider, or that any particular enrolled member have access to any particular provider. **Even if Petitioners could prove Anthem's network was inadequate under those standards, the only remedy within the Department's authority would be to order Anthem to address any deficiencies by contracting with additional providers. These additional providers would not necessarily include Petitioner Frisbie.**" (Emphasis added). To be sure, as the Commissioner stated in an undisturbed portion of his December 11, 2013 Order, "[i]t would serve no purpose, and waste both agency and judicial resources, to allow an appeal of an agency decision when the agency does not have the power to grant the requested relief." (December 11, 2013 Order at page 8.).

WHEREFORE, for all the foregoing good reasons, Anthem respectfully submits that the Commissioner should reconsider his Hearing Order and it moves for a rehearing.

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By 

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CERTIFICATION

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