

**State of New Hampshire
Insurance Department**

In Re: Petition of Margaret McCarthy

Docket No. Ins. 13-038-AR

**RULING ON TIMELINESS OF PETITIONER MCCARTHY'S
PETITION FOR HEARING PURSUANT TO RSA 400-A:17**

Procedural Background

On March 28, 2014, I issued an Order and Notice of Hearing finding in relevant part, that Petitioner Margaret McCarthy ("Petitioner McCarthy" or "the Petitioner") has standing to request a hearing pursuant to RSA 400-A:17, II(b) as a consumer who has alleged she has suffered an injury in fact because she is qualified for a federal subsidy under the Affordable Care Act, but cannot access that subsidy without purchasing a policy that she asserts has been improperly certified by the Department because it does not include Frisbie Hospital in its network of providers.

On April 3, 2014, Anthem Blue Cross Blue Shield of New Hampshire ("Anthem") filed a Request for Rehearing¹ seeking reconsideration of my March 28th Order and Notice of Hearing. Anthem's Request for Rehearing raised two issues, first, that the March 28th Order failed to address Anthem's assertion that Petitioner McCarthy's request for hearing under RSA 400-A:17,III was untimely, and second, that the Order erroneously found that Petitioner McCarthy had standing.

On April 4, 2014, I issued a Ruling on Anthem's Request for Rehearing, finding that as to Anthem's challenge of Petitioner McCarthy's standing under RSA 400-A:17, its Motion for Rehearing did not raise any new factual or legal issues that had not already been carefully considered and addressed. However as to whether or not Petitioner McCarthy's Petition for Hearing Pursuant to RSA 400-A:17, II(b) was timely, I concluded that additional factual and legal information should be considered. Thus my April 4th Ruling suspended the March 28th Order as to the issue of timeliness of Petitioner McCarthy's Petition for Hearing, and continued the April 9th scheduled adjudicative hearing to April 22, 2014 (conditional on a favorable ruling as to

¹This is the second request for rehearing filed in this matter. Frisbie Memorial Hospital and Margaret McCarthy had previously filed a Motion for Rehearing on January 10, 2014, as to an Order issued on December 11, 2013. Ultimately the reconsideration of the December 2013 Order resulted in the issuance of the March 28, 2014 Order and Notice of Hearing which found Petitioner McCarthy had standing to request an adjudicative hearing pursuant to RSA 400-A;17,II(b), but upheld a prior determination that Petitioner Frisbie Memorial Hospital did not.

timeliness).² Petitioner McCarthy was directed to file “any legal or factual argument responsive to Anthem’s Motion for Rehearing by April 11, 2014.”

On April 11th Petitioner McCarthy filed an unsigned Reply to the Anthem Motion for Rehearing, with leave to file a signed copy on April 14th. Anthem filed a Reply Brief Upon Rehearing, also on April 14th. In response to the Anthem Brief, the Petitioner then submitted an Affidavit of Margaret McCarthy on April 15th. My determination as to the timeliness of the McCarthy Petition for Hearing was to be issued that same day. Anthem immediately voiced its objection to the late filing of the Affidavit by the Petitioner asserting it should not be considered, and seeking in the alternative, reasonable opportunity to review the affidavit and submit a further responsive submission. Later in the day on the 15th, Anthem filed a Sur Reply to address the McCarthy Affidavit.

On April 15th I issued a Procedural Order advising that due to the filing of the Affidavit and the need to consider the Affidavit and provide Anthem time to review and respond to the Affidavit, the dispositive ruling on the timeliness of the McCarthy Petition could not be issued as anticipated. The need for time to consider the April 15th Affidavit also necessitated continuance of the hearing scheduled for April 22nd.

Anthem has had an opportunity to review the Affidavit and rests on the arguments presented in its April 15th Sur Reply, so I now turn first to the Affidavit to determine whether it can be considered in support of the Petitioner’s position that the Petition for Hearing filed on November 6, 2013, was filed in compliance with the 30-day limitation in RSA 400-A:17,III.

April 15th McCarthy Affidavit

In my Ruling of April 4, 2014, the Petitioner was ordered “to file any legal or factual argument responsive to the Anthem Motion for Rehearing by April 11, 2014.” The Petitioner did file a Reply to the Anthem Motion for Rehearing by April 11th but did not file the Affidavit of Margaret McCarthy until April 15th, the day I had planned to issue my Ruling as to the timeliness of the Petitioner’s request for hearing. The Petitioner did not request leave to file the Affidavit beyond the April 11th deadline and did not present any facts or arguments to support consideration of the Affidavit filed beyond the April 11th filing deadline.

Ins 204.10(d) governs extensions of time to submit pleadings. It states:

Except where the time has been fixed by statute, the hearing officer shall for good cause, upon request or upon the hearing officer's own initiative, enlarge or shorten the time provided for the filing of any document. Good cause shall

² My April 4th Ruling stated that a final determination as to the timeliness of Petitioner McCarthy’s Request for Hearing was expected to be issued on or before April 15, 2014, and if in that final determination I concluded Petitioner McCarthy’s Request for Hearing under RSA 400-A:17,III was timely, then a hearing on the merits would be conducted on April 22nd.

include the unavailability of information, parties, witnesses or attorneys necessary for the filing of the document, the likelihood that the filing will not be necessary because the parties anticipate a settlement or any other circumstances that demonstrate that a postponement would assist in resolving the case fairly.

Ins 204.03 controls the consequence for a late filing: “[f]ailure to comply with the rules in this part shall result in... the rejection of any document so failing to comply....”

The April 15th Affidavit was filed for the purpose of establishing that the November 6th Petition for Hearing was filed within the time requirement of RSA 400-A:17,III. The burden is on the Petitioner to prove by a preponderance of the evidence that her Petition for Hearing was timely. Ins 204.05(f). As to this matter, Anthem correctly points out the obvious: whether the Petitioner’s Petition for Hearing is timely or not turns on “what Ms. McCarthy knew and when.”³

The Petitioner has filed eight pleadings addressing her right to have an adjudicative hearing. A prior Affidavit signed by Margaret McCarthy was filed with the Petitioner’s December 2, 2013, Proof of Standing. This Affidavit attests to what information Ms. McCarthy knew, but is silent as to when she came to know or obtained this information. Even the most recent April 11th pleading—filed by the Petitioner to specifically address the timeliness of the Petitioner’s November 6th Petition for Hearing—has no information provided as to this critical issue of when the Petitioner knew what she knew.

As the Petitioner has filed no motion to request leave to file the April 15th Affidavit beyond the filing deadline, I have before me no argument from Ms. McCarthy to justify the late filing. I do recognize that the time deadlines have been tight in order to comply with the letter and the intent of the Administrative Procedures Act, that the Affidavit was filed one business day beyond the deadline, and that Anthem has been given ample opportunity to respond. However, I still cannot rule that pursuant to Ins 204.10(d) Petitioner has shown good cause for extending the April 11th deadline to April 15th.

Ins 204.02 provides an alternative means of addressing the late submission of the Affidavit. Ins 204.02 states:

The hearing officer, upon the hearing officer's own initiative or upon the motion or petition of any interested person, shall suspend or waive any requirement or limitation imposed by this chapter not otherwise contrary to law, upon reasonable notice to affected persons, when the proposed waiver or suspension appears to be lawful and would be more likely to promote the fair, accurate and efficient resolution of issues pending before the department than would adherence to a particular rule or procedure.

³ April 14, 2014, Anthem Reply Brief Upon Rehearing at page 6.

Based on this provision, I may waive the requirement that the Petitioner file all pleadings by April 11th if I determine that waiver of the filing deadline and acceptance of the Affidavit, is more likely to result in a fair, accurate and efficient resolution of issues than would strict adherence to the April 11th deadline and rejection of the Affidavit.

The Affidavit contains statements as to when Ms. McCarthy became aware of critical facts relevant to the timeliness of her Petition for Hearing. Absent this Affidavit, there is scant evidence on the record that would provide this necessary information. Thus, admitting the late Affidavit would promote a more accurate resolution. Accuracy is likely to lead to efficiency because it will reduce the risk of motions for rehearing and appeals. Admitting the Affidavit will likely promote a “fair” resolution despite the delay of the hearing and associated inconveniences and Anthem’s diligence in presenting timely and comprehensive pleadings. These impacts have already been suffered, Anthem has now had an opportunity to respond, and rejecting the Affidavit will not undo the damage done nor advance overall fairness.

The fact that the Affidavit will promote a more accurate, efficient and fair resolution of issues tips the balance in favor of waiving the filing deadline and accepting the late Affidavit. Therefore, in accordance with Ins 204.02, I will waive the April 11th filing deadline and will now consider the Affidavit in my determination. I would however remind counsel that while administrative hearings are not conducted with the same formality as court proceedings, the rules at Ins 200 are provided to ensure a fair resolution of matters and to avoid unnecessary delay or cost. Due regard should be paid to these standards throughout the remainder of this proceeding.

Timeliness of Petition for Hearing: Standard for Review and Assertions of the Parties

The timeliness of Petitioner McCarthy’s appeal is governed by RSA 400-A:17. RSA 400-A:17, II(b) provides for the right to an adjudicative hearing... upon written application for a hearing by a person aggrieved by any act... of the commissioner.” RSA 400-A:17,III requires that the application must be filed “within 30 days after such person knew or reasonably should have known of such act” and that the application “shall briefly state the respects in which the applicant is so aggrieved.”

The Petitioner asserts in her Reply to Motion for Rehearing filed on April 11, 2014, that the 30-day time limitation in RSA 400-A:17,III should not apply to her because “the Department issued no order, and the public was made aware of its decision only by viewing its impact as health plans began to be marketed and sold” and thus “‘timeliness’ has no meaning.”⁴ The Petitioner further contends that to deny the Petitioner’s request as untimely would, under these circumstances, “constitute a disgraceful failure of due process.”⁵ The principle underlying Petitioner McCarthy’s assertion seems to be that without “notice of any kind from

⁴ April 11, 2014, Petitioner McCarthy’s Reply to Motion for Rehearing at page 3.

⁵ *Id.*

the Department that detailed the kind, quality and nature of the plans approved” it is “impossible for the public to know whether there was anything about the Department’s decisions that required appeal or review.”⁶

Anthem states that the April 15th Affidavit shows that the Petitioner by her own admission knew by mid-September that the Department had recommended Anthem’s limited network for approval and that Frisbie Hospital would not be included in this narrow network that would be used for Exchange plans.⁷ The Petitioner was also “on public notice” through the Department’s August 1, 2013, press release “of the fact that, on the Exchange, for those individuals who qualified, subsidies would be available to lower the cost of coverage.”⁸ Anthem contends that the information provided in paragraph 4 of the April 15th Affidavit concerning what Petitioner McCarthy learned on October 9th is of no importance—it does not alter what the Petitioner knew in mid-September and only expresses “what her specific options were going forward.”⁹

There is however no dispute between the parties or the Department as to what “act” is at issue. All agree that the “act” is the Department’s recommendation to the federal Center for Consumer Information and Insurance Oversight to approve Anthem’s proposed Marketplace plans, which relied upon a provider network that did not include Frisbie Hospital.¹⁰ This act of the Department occurred on July 31, 2013, and will be referred to in this Order as the “July 31st recommendation.” There is also no dispute that the Petition for Hearing was filed on November 6, 2013, and was therefore, not filed within 30 days of the “act” occurring on July 31st.

Timeliness of Appeal

As I have previously ruled, to have standing to appeal the Department’s July 31st recommendation, the Petitioner must demonstrate that she is aggrieved because she has or will suffer an injury in fact. In re: Union Telephone Company, 160 NH 309, 313 (2010). A consumer has not suffered an injury in fact if the act does not directly affect her legal rights or interests. In this case, I have determined that the Petitioner has presented grounds for being aggrieved by an act of this Department. She asserts that although she qualifies for a federal subsidy, she cannot access this subsidy without purchasing a policy that she alleges is inadequate because it does not include Frisbie Hospital.¹¹

⁶ *Id.* at 4.

⁷ April 15, 2014, Anthem Sur Reply at page 1-2

⁸ *Id.* at 2.

⁹ *Id.* at 2, fn2.

¹⁰ See November 6, 2013, McCarthy *Petition for Hearing Pursuant to RSA 400-A:17*, paragraph 15 and 16 page 5; April 14, 2014, Reply Brief Upon Rehearing by Anthem Blue Cross and Blue Shield at pages 6-7; and December 11, 2013, Order at page 3.

¹¹ March 28, 2013, Order and Notice of Hearing at page 6.

I agree with Anthem that by mid-September the Petitioner was aware of the July 31st recommendation. She admits that she became aware through media reports that the Anthem “narrow-network” would not include her physicians or Frisbie Memorial Hospital.¹² But the Petitioner also states that she was told by Anthem that the narrow network would not affect her policy.¹³ She states that it was on or about October 9th that she received a letter from Anthem notifying her that her policy would not be renewed and that she would be able to enroll through the Exchange, where she confirmed that her personal health care providers and Frisbie would not be part of the network and that in the alternative she could purchase a new policy that would retain her current providers but would not allow her to take advantage of the subsidies available on the Exchange.¹⁴ Indeed it was not until October 1, 2014, that any consumer could access the Exchange website¹⁵ to determine her eligibility for subsidies, or what rates and subsidized plans were available.¹⁶

Anthem argues that the April 15th Affidavit shows that the Petitioner knew by mid-September that “if she decided to pursue health insurance coverage through the Exchange, including if she were able to qualify for a subsidy, she would have to switch her treating providers.”¹⁷ But Anthem can only show that in mid-September the Petitioner was on notice that “if” she decided to purchase coverage on the Exchange and “if” she qualified for the federal subsidy, then she would be impacted by the July 31st recommendation. An injury that is speculative does not constitute a direct injury in fact sufficient to give the Petitioner grounds to assert she is aggrieved. Hannaford Bros. Co. v. Town of Bedford, 164 N.H. 764, 769 (2013).

Anthem in an earlier pleading¹⁸ refers to the so called “discovery rule” and the holding in Furbush v. McKittrick, 149 NH 426 (NH 2003), that the discovery rule does not toll the statute of limitations “until the full extent of the plaintiff’s injury has manifested itself.” *Id.* at 431. There is, however, no authority suggesting the discovery rule is applicable to RSA 400-A:17 or that it should control a determination of when the 30-day limitation would begin to run as to the Petitioner. See Kierstead v. State Farm Fire and Casualty Company, 160 N.H. 681, 689 (2010).

I must in the end, reconcile the provisions of RSA 400-A:17,II(b) and RSA 400-A:17,III and determine when the 30-day limitation in RSA 400-A:17,III began to run as to Petitioner McCarthy. In doing so, I will not read each provision of the statute in isolation or construe the statute to lead to an absurd or unjust result. See Garand v. Town of Exeter, 159 N.H. 136, 140–41 (2009).

¹² April 15th Affidavit, paragraph 2.

¹³ *Id.* paragraph 3.

¹⁴ *Id.* paragraph 4.

¹⁵ I also take official notice in accordance with RSA 541-A:33,V of the technical fact that consumers faced difficulties in gaining access to information on the federally facilitated Exchange due to software and capacity problems systems in the first weeks after the October 1, 2014, rollout.

¹⁶ See August 1, 2013, Press Release issued by the New Hampshire Insurance Department, attached to the November 6, 2013, Petitioner’s Request for Hearing Pursuant to RSA 400-A:17.

¹⁷ April 15, 2014, Anthem Sur Reply at page 2.

¹⁸ December 11, 2013, Anthem Supplemental Brief at page 3, fn3.

The difficulty in applying the 30-day limitation in RSA 400-A:17, III is that there is a gap of time between the date the Petitioner knew of the “act” (mid-September) and the date the Petitioner alleges she knew she was aggrieved (October 9th). In many cases, a party is aggrieved immediately upon learning of the action taken by the Department, such as is the case when an application for a license is denied. But here, I find that the Petitioner did not know until October 9th that the July 31st recommendation would directly affect her right to purchase a subsidized plan, or if she would be eligible for a federal subsidy.

RSA 400-A:17,III cannot reasonably be read to require that the 30-day time limitation begins to run even before a person is aware that she is directly impacted by an act of the Commissioner. Even if a person should request a hearing without knowing if she were directly impacted by an act of the Commissioner, such a request would be rejected because that individual could not state (as required by RSA 400-A:17,III) “the respects in which the applicant is so aggrieved.” If the individual is not aggrieved, that individual’s request for hearing would be rejected for lack of standing.

At the same time, I cannot agree with the Petitioner’s contention that “‘timeliness’ has no meaning.” This position would itself render meaningless the 30-day limitation in RSA 400-A:17,III. Even assuming that RSA 400-A:17 is a statute of limitation rather than a statute of repose, striking the 30-day limitation as is suggested, would countermand the state’s interest in discouraging the presentment of stale appeals. Wolf Investments, Inc. v. Town of Brookfield, 129 N.H. 303, 305 (1987) See also discussion at Big League Entertainment, Inc. v. Brox Industries, Inc., 149 N.H. 480, 482 (2003).

The Petitioner—who is a layperson as to the Affordable Care Act—was unable until October 1st to access information about the plans and subsidies available to her, and she further attests that she did not know until October 9th that the July 31st recommendation would affect her directly. Reading RSA 400-A:17 as a whole, I conclude that the 30-day time limitation as to this Petitioner, can only begin to run once she knew of the July 31st recommendation and also knew that this act impacted her directly. To find otherwise would be to require that an individual file an appeal even before the individual knows whether the act complained of results in an injury of impairment to a legal right or interest.

I therefore find that the Petition for Hearing Pursuant to RSA 400-A:17 is timely because the Petitioner filed that petition within 30 days of when she knew or could have reasonably known, that her right to access the federal subsidy was impacted by the July 31st recommendation.

Because the Petition for Hearing has been found timely based on the April 15th Affidavit, the adjudicative hearing will proceed on May 14, 2014, at 9:00 am at the New Hampshire Insurance Department, 21 South Fruit Street, Concord, NH.

A prehearing conference shall be held on May 8, 2014, at 2:30 pm, also at the Department, to aid in the disposition of the proceeding. At the prehearing conference the parties shall identify

witnesses and exhibits that will be presented at the hearing and advise whether there are any stipulated or admitted facts or documents, or any other issues that can be addressed prior to hearing as described in Ins 204.13, to assist in the prompt and orderly conduct of the hearing itself.

It is SO ORDERED.

NEW HAMPSHIRE INSURANCE DEPARTMENT

Dated: 4-30-14



Roger A. Sevigny, Commissioner