

**STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT**

In Re: Frisbie Memorial Hospital, et al.

INS No. 13-038-AR

Order

Procedural History

On November 6, 2013, Frisbie Memorial Hospital and Margaret McCarthy (“Petitioners”) filed a Petition for Hearing Pursuant to RSA 400-A:17 (“Petition”) with the New Hampshire Insurance Department (“Department”). The Petition relates to the Department’s July 31, 2013 recommendation that the federal Centers for Medicare and Medicaid Services (“CMS”) certify certain health insurance plans being offered by Anthem Blue Cross and Blue Shield of New Hampshire (“Anthem”) as Qualified Health Plans to be sold on the Health Insurance Marketplace (“Marketplace”) being operated by the federal government on behalf of New Hampshire pursuant to the federal Affordable Care Act (“ACA”).

Petitioners’ central complaint is that Anthem did not include Petitioner Frisbie Memorial Hospital (“Petitioner Frisbie”) in the health care provider network for its Marketplace plans. Petitioners assert that, based on this exclusion, they are entitled to an adjudicative hearing before the Department as “persons aggrieved” under RSA 400-A:17. Petitioner Frisbie claims that it will lose revenue and be at a competitive disadvantage as compared to other medical providers because it is not part of Anthem’s Marketplace network, while Petitioner McCarthy alleges that she will have to change medical providers if she chooses to purchase Anthem coverage through the Marketplace. As relief, the Petition asks that the Department (a) schedule a hearing on whether Anthem’s Marketplace plans meet state and federal network adequacy standards; and (b) order Anthem to include Petitioner Frisbie in the provider network for its Marketplace plans.

On November 14, 2013, the Department asked Petitioners to submit further information and argument in support of their assertion that each qualifies as a “person aggrieved” within the meaning of RSA 400-A:17, II for purposes of seeking an adjudicative hearing on the Department’s decision to recommend approval of Anthem’s Marketplace plans. The Department also offered Anthem the opportunity to submit arguments on Petitioners’ standing.

The Department noted that in the event it found neither Petitioner had standing to request an adjudicative hearing under RSA 400-A:17, II as a “person aggrieved,” it would nevertheless schedule a discretionary public hearing under RSA 400-A:17, I on New Hampshire’s regulatory

standards and procedures for determining network adequacy and the balance between promoting access to care and controlling costs.

On December 2, 2013, Petitioners submitted arguments and affidavits in support of their claim of standing, and Anthem submitted a brief on the issue. Petitioners submitted a reply brief on December 6, 2013, and Anthem submitted a supplemental brief on December 11, 2013.

Findings and Analysis

As laid out in detail below, after reviewing the Petition, along with the briefs and affidavits submitted, I conclude that neither Petitioner is “a person aggrieved by any act or impending act . . . of the commissioner” within the meaning of RSA 400-A:17, II(b). Therefore, I am not required to conduct an adjudicative hearing in response to the Petition.

I. Adjudicative Hearing Requirements

RSA 400-A:17 provides that:

I. The commissioner may hold hearings for any purpose within the scope of [the Insurance Code] as he may deem advisable.

II. He shall hold a hearing:

(a) if required by any provision of this title,

(b) or upon written application for a hearing by a person aggrieved by any act or impending act, or by any report, rule, regulation, or order of the commissioner (other than an order for the holding of a hearing, or order on a hearing, or pursuant to such order, of which hearing such person had notice).

III. Any such application must be filed with the commissioner within 30 days after such person knew or reasonably should have known of such act, impending act, failure, report, rule, regulation, or order, unless a different period is provided for by other applicable law, and in which case such other law shall govern. The application shall briefly state the respects in which the applicant is so aggrieved, together with the ground to be relied upon for the relief to be demanded at the hearing. The commissioner may require that the application be signed and sworn to by a person competent to be a witness in civil courts.

IV. If the commissioner finds that the application is timely, made in good faith, and that the applicant would be so aggrieved if his grounds are established he shall hold a hearing within 30 days after the filing of the application, or within 30 days after the application has been sworn to, whichever is the later date, unless in either case the hearing is postponed by mutual consent.

V. Failure to hold the hearing upon application therefor of a person entitled thereto as hereinabove provided shall constitute a denial of the relief sought, and shall be the equivalent of a final order of the commissioner on hearing for the purpose of an appeal under RSA 400-A:24.

VI. Pending the hearing and decision thereon, the commissioner may suspend or postpone the effective date of his previous action.

Under RSA 400-A:17, holding a hearing is mandatory, as opposed to discretionary, in two situations. First, the commissioner must hold a hearing if a hearing is required under any provision of the Insurance Code. RSA 400-A:17, II(a). Petitioners do not cite any provision of the Insurance Code as requiring the hearing they seek, so paragraph II(a) is not applicable. Second, the commissioner must hold a hearing “upon written application for a hearing by a **person aggrieved by any act or impending act**, or by any report, rule, regulation, or order of the commissioner.” RSA 400-A:17, II(b). Petitioners are proceeding under this provision.

Specifically, Petitioners assert that they are aggrieved by the Department’s recommendation to the federal Center for Consumer Information and Insurance Oversight (“CCIIO”), a division of CMS, that Anthem’s proposed Marketplace plans, whose provider network does not include Petitioner Frisbie, be approved for sale as Qualified Health Plans (“QHPs”) on the federal Marketplace.

The central question is whether, as a matter both of fact and law, one or both Petitioners were “aggrieved” by the Department’s recommendation to CCIIO, which the Department agrees was an act of the commissioner within the meaning of RSA 400-A:17, II(b). Answering this question requires an understanding of the nature and legal basis of the Department’s recommendation, the nature of each Petitioner’s alleged injury, and the relationship between the alleged injury, the requested relief, and the Department’s recommendation.

II. The Department’s QHP Recommendation

Under the ACA, starting in October 2013, consumers in each state must have access to a Health Insurance Exchange or Marketplace, a website consumers can use, among other things, to purchase health insurance from private insurance carriers. In New Hampshire, the Marketplace is operated by the federal government under a partnership arrangement between the state and CCIIO. The Insurance Commissioner retains his traditional authority to regulate insurance companies and policies to the maximum extent permissible under federal law. See generally RSA chapter 420-N.

On April 10, 2013, the Department issued Bulletin No. INS 13-007-AB (“Bulletin”), which laid out for insurance carriers the legal standards and timeframes for gaining approval to sell plans on the Marketplace for the 2014 plan year.¹ As explained in the Bulletin, the Department’s role with respect to Marketplace plans was to review all plans submitted for conformity with both state and federal statutory requirements and standards, then make a recommendation to CCIIO as to whether each plan should be certified by the federal agency as a QHP for sale on the Marketplace. Bulletin at 1.

¹ A copy of the Bulletin is attached as Exhibit 1 to the Petition, and a link is available here: http://www.nh.gov/insurance/media/bulletins/2013/documents/ins_13_007_ab.pdf

The Bulletin established timelines and procedures for the submission of proposed QHPs. Specifically, June 1, 2013 was the deadline for carriers to submit plans to the Department using the SERFF electronic filing system, and July 31, 2013 was the Department's deadline, established by CCIIO, to submit its recommendations, again through the SERFF system, to the federal agency. Bulletin at 2. In August of 2013, CCIIO would give carriers the opportunity to address any data errors, and in early September of 2013, CCIIO would make a final decision on whether to certify each plan for sale on the Marketplace. Bulletin at 3. On October 1, 2013, the Marketplace would be open to the public for enrollment, and all plan details would be available for the public to view. Bulletin at 3.

The Bulletin also articulated the legal standards, both state and federal, that the Department would apply in its plan review. With respect to network adequacy, the Bulletin stated that this review was governed by RSA chapter 420-J and Ins Part 2701, as well as the federal standards contained in Section 2702(c) of the Public Health Services Act and 45 C.F.R. 156.230 and 156.235. Bulletin at 1-2, 4-5. As laid out in the Bulletin, the Department's review of network adequacy for proposed QHPs is conducted by an examiner in the context of a form filing review. In addition, the Department is authorized to take enforcement action after QHP approval if network adequacy standards are violated. RSA 420-J:14, cited in Bulletin at 1; see also Ins 2701.10.

On July 31, 2013 the Department submitted its QHP recommendations to CCIIO, and on August 1, 2013 the Department issued a press release indicating that the plan recommendations had been made.² Under Ins 4101.05(h), the plan rates and details would not become public until October 1, 2013, when the Marketplace opened for business. While the Department could not release any plan details prior to October 1, it became public knowledge in September 2013 that Anthem would be the only insurance carrier offering health plans on the Marketplace in 2014, and that these plans would use a provider network that did not include all 26 New Hampshire hospitals.³

III. Applicable Network Adequacy Standards

RSA 420-J:7, the primary network adequacy standard for New Hampshire, requires that “[a] health carrier shall maintain a network that is sufficient in numbers, types, and geographic location of providers to ensure that all services to covered persons will be accessible without unreasonable delay.” In addition, under the specific language of the Bulletin, all QHP issuers were required (1) to comply with Ins Part 2701 by filing a network adequacy report with the Department, (2) to submit an attestation that the network includes “essential community providers” as designated by CCIIO in the manner specified by federal regulations, and (3) to make their provider directories available for publication online. Bulletin at 4-5.

² A copy of the press release is attached as Exhibit 2 to the Petition, and a link is available here: http://www.nh.gov/insurance/media/pr/2013/documents/pr_080113.pdf.

³ See, e.g., Anthem Defends New Health Plans, New Hampshire Union Leader, September 18, 2013, link at <http://www.unionleader.com/article/20130918/NEWS12/130919231/0/SEARCH>.

The network adequacy standards do not require that a carrier contract with any particular provider, or that any particular enrolled participant have access to any particular provider. Rather, the standards are framed to ensure reasonable access (defined in terms of miles or driving time) to the vast majority (typically 90%) of enrolled participants. See Ins 2701.06, Standards for Geographic Accessibility. Consistent with the language of RSA 420-N:7, the rules' Basic Access Requirement provides that:

(a) Each health carrier offering a managed care plan shall maintain a network of primary care providers, specialists, institutional providers, and other ancillary health care personnel that is sufficient in numbers, types and geographic location of providers to ensure that all covered health care services are accessible to covered persons without unreasonable delay.

(b) A health carrier's network of participating providers shall be considered sufficient to meet the basic access requirement in Ins 2701.04(a) if it meets all of the standards contained in Ins 2701.02 through 2701.09.

Ins 2701.04(a) and (b).

Consistent with these regulatory standards, the Department would have legal grounds to disapprove the adequacy of Anthem's network only if that network did not meet the requirements of Ins Part 2701, or the specific federal law requirements that are laid out in the Bulletin. Petitioners do not allege that Anthem's network does not meet these standards; rather, their claims focus on the fact that Anthem did not include a specific provider, Petitioner Frisbie, in the provider network for its Marketplace plans.

IV. Petitioners' Alleged Aggrievement

Petitioner Frisbie alleges that it "is aggrieved by the Department's approval of the Anthem QHPs because it has been excluded, without notice or an opportunity to participate, in the networks available under Anthem's QHPs." Petition, paragraph 16. In its affidavit and brief on standing, Petitioner Frisbie provides more detail, asserting that Anthem did not initiate negotiations with it with regard to inclusion in the Marketplace plan network, despite the fact that "Frisbie and its employed physicians have been part of Anthem's network of approved providers for many years . . ." Proof of Standing, paragraph 7. Petitioner Frisbie also complains that Anthem included its competitor Wentworth Douglas Hospital in the Marketplace network, which action has allegedly "materially impaired Frisbie's ability to compete for patients in its service area." Proof of Standing, paragraph 8.

Petitioner Margaret McCarthy alleges that she is aggrieved because she is "required to give up health care providers associated with Frisbie in order to obtain insurance on the Marketplace." Petition, paragraph 16. Petitioner McCarthy asserts that she is a current Anthem policyholder whose current policy permits her to access Frisbie providers, but who will not be able to renew her policy when its term ends in 2014. Proof of Standing, paragraph 11. Moreover, Petitioner

McCarthy alleges, she will not be able to access subsidies through the Marketplace if she wishes to remain with her Frisbie providers. *Id.* Petitioners reiterate, but do not add to, these allegations in their reply brief filed December 6, 2013.⁴

V. Legal Standard for Aggrievement

To have standing to appeal an administrative agency's decision "a party must demonstrate that its rights 'may be directly affected by the decision, or in other words, that [it] has suffered or will suffer an injury in fact.'" *In re. Union Telephone Co.*, 160 N.H. 309, 313 (2010), quoting *Appeal of Richards*, 134 N.H. 148, 154 (1991). The inquiry into whether Petitioners are "aggrieved" is similar to that required in the federal courts to establish Article III standing. There, the alleged injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. —, —, 130 S.Ct. 2743, 2752 (2010); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

To prove "injury in fact," a person must show first that the action being challenged has or will have a direct effect on the person's legally protected interest. A person may have a legally-protected interest for purposes of some decisions, but not others. In the administrative context, the New Hampshire Supreme Court has granted standing to consumers to appeal rate-setting decisions by the Public Utilities Commission. *Appeal of Richards*, 134 N.H. 148 (1991). However, the Court denied standing to appeal Commission decisions that do not directly impact ratepayers, even where the decision may lead to rate increases in the future. *Appeal of Campaign for Ratepayers Rights*, 142 N.H. 629 (1998).

The standing analysis focuses not on the claimed severity of the alleged injury, but on the degree to which the injury is connected to the decision being challenged. Even where there is an allegation of serious harm or economic disadvantage, the Court has not found standing where there is no direct link between the challenged action and the alleged harm. See *Avery v. N.H. Dept of Education*, 162 N.H. 604 (2011)(abutting property owners lacked standing to challenge school lot size waiver granted by state Department of Education, despite allegation of reduction of property value, because alleged harm not sufficiently connected to purpose of waiver process); *Nautilus of Exeter v. Town of Exeter*, 139 N.H. 450 (1995)(denying standing to pursue zoning appeal based solely on increased competition from construction of similar facility in same town). Without a direct relationship between the decision and a party's legal right, there is no injury in fact. *Appeal of Richards*, 134 N.H. 148 (1991).

Similarly, a person cannot be found to be "aggrieved" where reversal of the challenged decision will not correct the alleged harm. Significantly, the cases Petitioners cite in which increased or unfair competition was found to confer standing to pursue an administrative appeal involved

⁴ Both of Anthem's briefs and Petitioners' reply brief also address the issue of the timeliness of the Petition. Because the Department finds that petitioners lack standing, this order does not address the issue of timeliness.

decisions by regulatory agencies that favored one regulated entity over another. Union Telephone, 160 N.H. 309 (2010)(competing telephone companies regulated by Public Utilities Commission); N.H. Bankers Ass'n v. Nelson, 113 N.H. 127 (1973)(competing banks regulated by the banking commissioner). In those cases, an erroneous or procedurally unfair decision by an agency could be corrected following a reversal on appeal, because the agency had authority to regulate all of the competitors in question. By contrast, when the effect complained of is beyond the scope of the regulatory system, even a successful appeal will not redress the alleged harm.

In sum, in order to establish that they are “aggrieved” within the meaning of RSA 400-A:17, II(b), each Petitioner must demonstrate that they have a right or a legally protected interest, that the Department’s action caused a direct injury to that right, and that the Department has authority to grant the relief they request.

VI. Analysis of Petitioners’ Standing

Neither Petitioner qualifies as an “aggrieved person” under RSA 400-A:17, II(b). Petitioners’ allegations with regard to standing focus entirely on the alleged harm they will suffer as a result of Anthem’s decision to exclude Petitioner Frisbie from its Marketplace network. They are silent, however, on the connection between the Department’s decision and that alleged harm; they do not assert that the Department’s decision to approve Anthem’s network violated any legal standard;⁵ and they put forth no argument as to how a favorable decision would make them whole.

Even if the Department’s network adequacy review violated the Insurance Code in some substantive respect (which Petitioners do not allege, other than their allegation that the Department did not conduct a hearing, which the Code does not require), the Department has no authority to order Anthem to contract with any particular provider. The agency action Petitioners challenge is the Department’s determination, in the context of its recommendation to CCIIO that the Anthem plans be certified as QHPs, that Anthem’s network met applicable network adequacy standards. These 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.

Central to Petitioner Frisbie’s claim of standing is the assertion that the Department’s action will place it at a competitive disadvantage relative to other providers that were included in Anthem’s

⁵ Petitioner’s only allegations that the Department’s action was unlawful relate to the fact that it lacked a process for public input. Petitioners cite no authority requiring such input, other than a generalized constitutional due process claim. Without standing, Petitioners cannot rely on a constitutional due process claim. See Appeal of Richards, 134 N.H. 148, 154 (1991)(“ . . . a party has standing to raise a constitutional issue only when his own personal rights have been or will be directly and specifically affected.”).

Marketplace network. This allegation is not compelling, given that the Department does not regulate competition between medical providers. As discussed above, the cases Petitioner Frisbie cites on the issue of competitive disadvantage involved competitors within a regulated industry that were being placed at a disadvantage by a decision of their regulator. Union Telephone, 160 N.H. 309; Bankers Ass'n v. Nelson, 113 N.H. 127. Even if Petitioner Frisbie's allegations are true, being subject to increased competition, without a direct injury to a legal right, is not enough to confer standing. Nautilus of Exeter v. Town of Exeter, 139 N.H. 450.

Petitioner McCarthy claims that, as a consumer, she will be disadvantaged because she must choose between purchasing a subsidized policy through the Marketplace, and keeping her present medical providers, who are not in Anthem's network. This alleged harm, like Petitioner Frisbie's claim of competitive disadvantage, is beyond the purview of the Department's regulatory authority. If Petitioner McCarthy claimed that Anthem were violating the terms of its insurance contract, the Department would have authority to act. However, she makes no such allegation, and she cites no legal basis for her claimed right to have a particular insurance carrier include a particular medical provider in its network.

The harms Petitioners complain of are related to Anthem's decision not to contract with Petitioner Frisbie; they were not caused by the Department's determination that Anthem's network met applicable network adequacy standards. In a very recent decision, the federal District Court for Connecticut found that medical providers had standing to challenge a health insurance carrier's decision to exclude thousands of medical providers from its Medicare provider network, and issued an injunction against the insurer. Fairfield County Medical Ass'n v. United Healthcare of New England, U.S. Dist. Ct. (Conn.) No. 3:13-cv-1621, December 5, 2013 (Ruling and Order Granting Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction). That case was brought against the health insurer directly, not against a regulatory agency.

In sum, both Petitioners lack standing because they have alleged no harm that a decision of the Department could remedy.⁶ There is no legal authority that would allow the Department to grant their requested relief of ordering Anthem to contract with Petitioner Frisbie. It 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.

Public Hearing under RSA 400-A:17, I

In view of general public concern about Anthem's Marketplace network, I find that it would be in the public interest for the Department to hold a public informational hearing pursuant to RSA 400-A:17, I about New Hampshire's regulatory standards and procedures for determining network adequacy and the balance between promoting access to care and controlling costs. The

⁶ Because Petitioners' allegations with regard to standing fail as a matter of law, it is not necessary for the Department to make factual findings on this issue, and nothing in this order should be construed as a factual finding.

Department will issue separate public notice of the hearing, which it anticipates will be scheduled for January 2014.⁷ All interested members of the public, including Petitioners will be welcome to attend and offer testimony. Because the hearing is not an adjudicative one, the requirements of RSA 400-A:17, II-V with respect to the scheduling of adjudicative hearings do not apply.

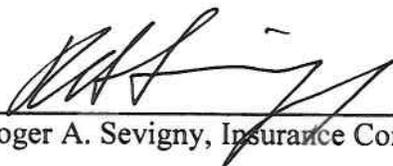
Order

In view of the analysis above, I find that neither Petitioner is an "aggrieved person" within the meaning of RSA 400-A:17, II(b), and that the Department is not required by law to hold an adjudicative hearing on the Petition. For purposes of any appeal Petitioners may wish to file under RSA 400-A:24, this decision is my final order on the Petition.

SO ORDERED.

NEW HAMPSHIRE INSURANCE DEPARTMENT

Date: 12-11-13



Roger A. Sevigny, Insurance Commissioner

⁷ As noted in recent correspondence between counsel, the Department is still in the process of responding to the Right-to-Know request Petitioners filed at the time they filed the Petition. Although the documents associated with the Department's network adequacy review are non-public under RSA 420-J:11, I anticipate that, after consultation with Anthem, I may choose in my discretion under RSA 420-J:11 to make some or all of these documents public prior to the hearing. The scheduling of the public hearing will allow this review and any potential release of documents to take place in advance of the public hearing.