

THE STATE OF NEW HAMPSHIRE

INSURANCE DEPARTMENT

In re Petition of Margaret McCarthy

Docket No. INS 13-038-AR

**REPLY BRIEF UPON REHEARING  
BY ANTHEM BLUE CROSS AND BLUE SHIELD**

Anthem hereby replies to Petitioner McCarthy's April 11, 2014 Brief and respectfully submits that, upon rehearing, the Department should reverse its March 28, 2014 Order And Notice Of Hearing ("Hearing Order"), as it pertains to the standing of Petitioner Margaret McCarthy ("Ms. McCarthy")<sup>1</sup> because it is now clear from the entire administrative record that Ms. McCarthy's Petition was untimely and consequently, it should not be considered at an adjudicative hearing.<sup>2</sup>

In its Motion For Rehearing seeking reconsideration of the Hearing Order, and in particular, in Section I 4 at pages 6-7 thereof, Anthem sets forth in detail the multiple opportunities that Petitioner McCarthy has had, but knowingly passed up, to submit reliable evidence—as opposed to attorney argument<sup>3</sup> — demonstrating that she, as the Petitioner,

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<sup>1</sup> 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.

<sup>2</sup> Anthem reserves its rights to challenge the finding in the Hearing Order that Ms. McCarthy has standing and the rejection in the April 4, 2014 Ruling on Anthem's Request For Rehearing ("Rehearing Order") of reconsideration on the other stated grounds.

<sup>3</sup> To be clear, throughout these proceedings before the Insurance Department, Petitioner McCarthy has been represented by able counsel, who certainly understand the importance of sworn affidavits.

based on her own circumstances, filed her Petition timely under Section II of the controlling RSA 400-A:17. In his Rehearing Order, the Commissioner concluded that, “as to the issue of timeliness...additional factual and legal information should be considered” and he ordered that Ms. McCarthy make any such further submission for the Department’s consideration on the timeliness issue. In essence, since Ms. McCarthy, as the Petitioner seeking relief under the requirements of the statute, is the only one who really knows when she first knew of the Department’s Decision she attacks, the Commissioner gave Petitioner McCarthy yet another chance to document that her Petition was timely filed in accordance with New Hampshire law. Surprisingly, however, the Brief filed on her behalf offers no new factual information evidencing when Ms. McCarthy, as opposed to the general public, first knew about the Department Decision that she claims caused her aggrievement. Instead, the Brief simply rehashes generic arguments, which cannot carry her burden on this issue. Ms. McCarthy’s continued personal silence on the very issue under consideration is deafening. In fact, when viewed in the context of her otherwise active and aggressive involvement in issues surrounding the Exchange,<sup>4</sup> Ms. McCarthy’s failure yet again to submit a sworn affidavit and/or other reliable evidence is dispositive that her Petition was untimely and must not be further considered.

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<sup>4</sup> To be sure, Ms. McCarthy has not otherwise shied away from expressing her displeasure with the Department’s Decision and Frisbie’s exclusion from Anthem’s Pathway Network. For example, she has been interviewed by the media on more than one occasion (see, [http://www.fosters.com/apps/pbcs.dll/article?AID=/20131120/GJNEWS\\_01/131129946](http://www.fosters.com/apps/pbcs.dll/article?AID=/20131120/GJNEWS_01/131129946) and [http://www.unionleader.com/article/20140329/NEWS12/140329089?utm\\_source=MailingList&utm\\_medium=email&utm\\_campaign=MARCH3113+Browser](http://www.unionleader.com/article/20140329/NEWS12/140329089?utm_source=MailingList&utm_medium=email&utm_campaign=MARCH3113+Browser)); she joined with Frisbie to file the November 6, 2013 Petition at issue; she submitted an Affidavit in support of her Petition in early December, 2013, but without swearing to any facts related to the timeliness issue; and she spoke without restriction at the public hearing held by the Department on February 10, 2014.

In further response to the commentary — not evidence — submitted in Petitioner McCarthy's Brief, Anthem states as follows:

First, the integrity of the statutory process governing the Insurance Department's investigations and its enforcement of New Hampshire's insurance laws<sup>5</sup> is of vital importance and petitions that would ignore or otherwise circumvent the procedural mandates protecting the Department's orderly conduct should not be permitted — even in the face of external pressure — to erode that process. New Hampshire courts have confirmed the 30 day time limit under Section III of RSA 400-A:17, see, e.g., United American Insurance Company v. Francis E. Whaland, Insurance Commissioner, 115 N.H. 212, 337 A.2d 358, 1975 LEXIS 262 (“...the company had thirty days under RSA 400-A:17 III...the section company counsel readily recognized as applicable...”), and here, since the Petition is untimely on its face,<sup>6</sup> and Ms. McCarthy has wholly failed to establish timeliness, the Petition must be denied.<sup>7</sup>

Second, by providing notice of its July 31, 2013 Decision approving Anthem's QHPs through its August 1, 2013 Press Release, which is Exhibit 2 to Ms. McCarthy's Petition, and

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<sup>5</sup> See, Chapter 400-A: Insurance Department and Chapter 541-A: Administrative Procedure Act.

<sup>6</sup> As previously noted in Anthem's Standing Submissions, which are incorporated herein, the Petition was filed eighty-four (84) days, not less than thirty (30) days, from the Department's at issue July 31, 2014 Decision approving Anthem's Qualified Health Plans for the Exchange.

<sup>7</sup> This statutory time limitation also works to avoid the Department's resources being overwhelmed and the wasting of expenses, which is of particular importance here, where the Petitioner has already been afforded the opportunity to be heard at a public hearing, held at the Department's expense on February 10, 2014, and where it is acknowledged that the relief her Petition seeks (that Anthem be required to add Frisbie to its Pathway Network) is not a remedy that the Department can order—regardless of the outcome of a time consuming and expensive adjudicative hearing.

by its immediate posting on its public website at that same time, the Department fully complied with the April 10, 2013 Insurance Department Bulletin<sup>8</sup> and with New Hampshire law. Other than more generic argument, Ms. McCarthy cites to no law that required other notice of the Decision and any implication that Ms. McCarthy was somehow entitled to personal notice herself would be absurd. Likewise, any reiterated complaint that Ms. McCarthy's due process rights were harmed because she was not afforded the opportunity to participate in a hearing as to the determination that Anthem's QHPs satisfied network adequacy requirements should again fall on deaf ears. As Anthem stated in Footnote 5 on page 3 of its December 2, 2013 Brief, such a claim is without merit, as procedural due process rights are not triggered where, as here, the government acts generally. "[P]rocedural due process imposes constraints on governmental decisions which deprive *individuals* of liberty or property." (Emphasis added; internal quotation marks omitted.) Collins v. Univ. of N.H., 746 F. Supp. 2d 358, 368 (D.N.H. 2010), *aff'd*, 664 F.3d 8 (1<sup>st</sup> Cir. 2011). Procedural due process does not require a hearing when the government acts in a legislative, or broadly rule-making or policy-forming, capacity. O'Neill v. Nantucket, 711 F.2d 469, 472 (1<sup>st</sup> Cir. Mass. 1983). Further, under New Hampshire law, the Department is not required to hold any type of hearing prior to reviewing and approving a payor's network adequacy filings. See New Hampshire Insurance Regulation 2700. To be sure, Petitioner McCarthy had the right and opportunity to seek additional information from the Department, her providers and as an Anthem member regarding Anthem's submissions relating to its

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<sup>8</sup> The Bulletin is Exhibit 1 to Ms. McCarthy's November 6, 2013 Petition.

application for approval of its QHPs and regarding the Department's Decision — but the administrative record is devoid of any evidence at all that she availed herself of such avenues. Ms. McCarthy's own failure to comply with New Hampshire law by filing a timely Petition constitutes an error on her part, not a violation of any due process rights.

Finally on this point, the Petitioner's complaints ring hollow because, in addition to the publications by the Department, there was substantial other information about the Department's approval and the fact that Frisbie was not included available to Ms. McCarthy in the mainstream media well before her Petition was filed. See, for example, the News Link cited to by the Commissioner in Footnote 3 at page 4 of his December 11, 2013 Order; the September 19, 2013 Union Leader new story that is Attachment C to Anthem's December 6, 2013 Brief; and the September 22, 2013 televised episode of Close-Up TV, which was previewed on September 19, 2013 at <http://www.youtube.com/watch?v=zQ8SGpL4ToQ>, and featured an in-depth discussion with Anthem's President, Lisa Guertin, and Frisbie's Chief Executive Officer, Al Felgar, regarding the New Hampshire Exchange, the Department's Decision, and Frisbie's exclusion from Anthem's Pathway Network.

In addition, as a long-time patient of Frisbie and its affiliated providers, Ms. McCarthy had the opportunity to, and may well have, learned further information about these subjects from those providers, who were well aware--even before the Department's July 31, 2013 Decision — that they were not going to be included, and who became very vocal and active in trying to reverse Anthem's decision long before the Petition was filed. In summary, it is clear that, in fact, there was ample information from the Department and in the public domain to

provide Ms. McCarthy with sufficient knowledge of the Department's Decision she belatedly challenged. In the end, what matters is what Ms. McCarthy knew and when, and on that point, she has not submitted a scintilla of evidence that trumps the fact that, on its face, her Petition was fatally late.

Third, it frankly borders on being disingenuous for the Brief filed on behalf of Petitioner McCarthy to attempt to distance her from the Petition's challenge to the Department's July 31, 2013 Decision approving Anthem's Pathway plans for the expedient purpose of now arguing at page 5 that there "was no event that would have triggered a time limit on Ms. McCarthy's right to petition under RSA 400-A:17, II." To be clear, Ms. McCarthy's Petition states in Paragraph 15 that "[t]he Department's review and approval of Anthem's QHPs was an act of the Commissioner and/or the Department. RSA 420-N:8, I..." and in Paragraph 16 that she has been "aggrieved" by that approval. Further, in Paragraph 6 at page 2 of her December 2, 2013 Proof Of Standing brief, Ms. McCarthy states in pertinent part that "[t]he Department's review of proposed plans submitted by Anthem in 2013 constituted an exercise of that authority. When the Department approved the plans as "network adequate," among other things, **its approval constituted an "act or impending act, or by any report, rule, regulation, or order of the Commissioner. RSA 400-A:17, II(b).**" To be sure, at page 3 of his December 11, 2013 Order, the Commissioner concurred that the Department's July 31, 2013 Decision triggered potential challenge rights by finding that "the central question is whether, as a matter of both 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 with the meaning of RSA 400-A:17, II(b).”<sup>9</sup> Based on this entire administrative record, there is no question that the challenged act was the Department’s July 31, 2013 approval and the timeliness of the November 6, 2013 Petition must be measured from that date.

For all the foregoing reasons, Anthem respectfully submits that it is clear that Ms. McCarthy’s Petition was not timely filed under RSA 400-A:17 and it should be denied without an adjudicative hearing.

Dated: April 14, 2014

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<sup>9</sup> Of note, at no time in any of Petitioner McCarthy’s prior submissions has she taken the position that the July 31, 2013 approval was not the challenged act that permitted her to file a petition under RSA 400-A:17, II(b). The fact that that Department Decision was the trigger is demonstrated by the Petitioner’s statements throughout her submissions, including, for example, at pages 4 (“Thus, the Department’s decision to approve Anthem’s Marketplace-available plans...injured Ms. McCarthy...”) and 7 (“Therefore, the Department’s decision...directly impacted Ms. McCarthy...”) of her January 10, 2014 Motion For Rehearing and in paragraph 1 on page 1 of her February 18, 2014 Supplemental Filing (“...the Department erred in approving Anthem’s plans for sale on the Marketplace”).

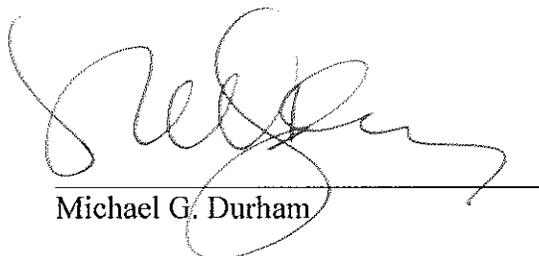
## CERTIFICATION

This is to certify that a copy of the foregoing was emailed, sent via facsimile and/or mailed, postage prepaid, on the above-written date, to:

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