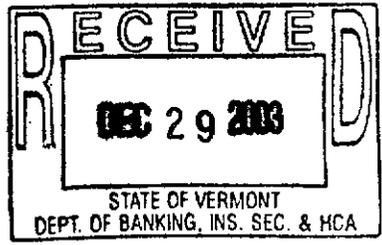


STATE OF VERMONT
DEPARTMENT OF BANKING, INSURANCE, SECURITIES
& HEALTH CARE ADMINISTRATION

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Blue Cross and Blue Shield of)
Vermont's Response to Opposition to)
Modify Order Amending Order)
Adopting Report of Examination)
)
)

DOCKET NO. 03-031-I



RESPONSE TO OPPOSITION TO MODIFY ORDER AMENDING ORDER
ADOPTING REPORT OF EXAMINATION

NOW COMES Blue Cross and Blue Shield of Vermont ("BCBSVT") by and through its attorneys, Primmer & Piper, P.C., and hereby responds to the Opposition by the Vermont Department of Banking, Insurance, Securities and Health Care Administration ("BISHCA") to BCBSVT's Motion to Modify the Order Amending Order Adopting Report of Examination.

I. INTRODUCTION

On May 20, 2003, BISHCA issued an Order Adopting the Report of Examination (the "final Order") which, among other things, imposed a \$10,000 penalty on BCBSVT for its failure to pay claims within the time period specified by 18 V.S.A. Section 9418. BCBSVT paid this fine. Subsequently, BCBSVT began working cooperatively with BISHCA in an effort to implement other aspects of the Order, including development of a computerized system approach to calculate and pay interest penalties simultaneously with payment of claims. BISHCA's Opposition to BCBSVT's Motion to Modify acknowledges that these efforts were ongoing when "it was determined the Company's

(referring to BCBSVT) noncompliance with the Order was best rectified by modifying the terms of the Order.” The final Order recognized that such a system approach might not be completed by October 1, 2003, and established a collaborative process to ensure compliance with 18 V.S.A. Section 9418. The information submitted by BISHCA in support of its Opposition to the BCBSVT Motion to Modify evidences this effort. Indeed, the Affidavit of Mr. Douglas Warren demonstrates the tremendous progress BCBSVT has made in processing claims as required by Section 9418. And, while it is correct that BCBSVT did not pay outstanding interest on the deadline contained in the Order for pre-existing late payments that were the subject of the final Order, it has now made the required payments. Further, the delay in making such payment was not the result of any bad faith, but rather it was, in fact, a byproduct of the collaborative process BCBSVT believed it had engaged in with BISHCA. Before and after the deadline, BCBSVT was endeavoring to insure the accuracy of its claim payment information. This need for verification was generated, in part, from BISHCA’s objection to the form of information provided to it by BCBSVT. The Amended Order was literally issued in the middle of this process.

II. PROCEDURAL DUE PROCESS ISSUES.

As noted above, it was following the issuance of a BLUE CROSS BLUE SHIELD OF VERMONT MARKET CONDUCT EXAMINATION (the “Report”), that the Commissioner issued the final Order. The Commissioner thereafter issued on November 13, 2003 an Order Amending the Order Adopting the Report of the Examiners (the “Amending Order”), which made findings of fact based on conduct alleged to have occurred between the date of the first Order and the issuance of the Amending Order, and

assessed a fine of \$20,000 on the BCBSVT. Those findings are not based on information contained in the Report. BCBSVT has moved to modify the Amending Order, specifically asking that BISHCA eliminate the \$20,000 fine. BISHCA opposed the motion by expanding on the facts alleged in the Amending Order and appending affidavits of the Market Conduct Chief and the Deputy Commissioner of the Insurance Division.

These “new” facts alleged in the Amending Order and the Division’s Opposition are, for purposes of a due process analysis, immaterial. Nevertheless, they do indicate that the initial Order was a final Order and that the procedural protections provided in the initial Market Conduct process were not observed. The Amending Order was issued without notice and a hearing, and such issuance constituted a clear violation of BCBSVT’s due process rights under the United States and Vermont Constitutions as well as Vermont statutory law. The Amending Order was based on facts independent of the Report that BCBSVT had no opportunity to rebut and on evidence offered by witnesses whom BCBSVT had no opportunity to cross-examine. BISHCA was without statutory authority when it, on its own initiative, reviewed and amended its final Order.

The Division asserts that the \$20,000 assessment is supported by law and justified by the facts. As the assessment was levied pursuant to an order issued in contravention of BCBSVT’s statutory and constitutional rights, it can be neither.

III. DISCUSSION

An individual must be afforded due process before a significant civil or administrative penalty attaches. See Town of Randolph v. Estate of Mildred White et. al., 166 Vt. 280 (1997). Notice and an opportunity to be heard are the essential elements

of the due process required in any proceeding that is to be accorded finality. Rich v. Montpelier Supervisory District, et. al., 167 Vt. 415 (1998). At least “some form of notice” and “an opportunity to be heard at a meaningful time and in a meaningful manner” is the absolute minimum requirement. See Charles H. Koch, Jr., Administrative Law and Practice, §5.32 (2d. ed. 1997); Mullane, 339 U.S. at 313.

The Vermont Legislature determined the requirements of due process when it enacted 8 V.S.A. §§ 3573-3574. Section 3573 establishes procedures by which BISHCA may initiate a market conduct examination. Section 3574 further provides that a party subject to such a proceeding must have an opportunity to review the contents of the Report and be afforded an opportunity to respond before the Report is incorporated into an Order issued by the Commissioner. See 8 V.S.A. § 3574. These provisions, together with the provisions of Title 3, Chapter 25, are calculated to ensure that a company that is the subject of a market conduct report is afforded its full due process rights. Here, this happened and a final Order was issued. Then, on its own initiative, BISHCA changed the final Order without so much as a telephone call or letter to the undersigned, counsel of record throughout the market conduct process.

Chapter 25 of Title 3, the Administrative Procedure Act (“APA”), defines a contested case as a proceeding in which legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for a hearing. This definition was recognized in the BISHCA’s Hearing Procedures Regulation No. 82-1 (as revised on May 1, 2000). As 8 V.S.A. §3574 grants a company being examined an opportunity to rebut in writing any matters contained in the examination report, and a hearing in accordance with the APA on appeal, any proceeding following the issuance of

the final order adopting a market conduct examination, particularly one assessing an additional penalty on the examined company, should be treated as a contested case. See 8 V.S.A. § 3574(c). BISHCA had the option of following the process in 8 V.S.A. Section 3574 by initiating a new market conduct process. Failing to do that, its options do not include a short-cut process by “deciding to rectify” its concerns by issuance of the Amending Order.

BISHCA also failed to contact BCBSVT’s counsel, Jeffrey P. Johnson, prior to issuance of the Amending Order. BISHCA disregarded the mandates of the Vermont Rules of Professional Conduct (“V.C.R.P.”) and the APA when the Deputy Commissioner hand-delivered the Amended Order to BCBSVT without BCBSVT’s counsel present and without providing a copy to Mr. Johnson. The V.R.C.P. forbids a lawyer from communicating with a represented party about the subject of the representation without the permission of that party’s counsel. No exception in the Rule applies to this case. While a lawyer representing a governmental entity may communicate with a party when conducting a “constitutionally permissible investigative activity,” that is not the case here. The Deputy Commissioner hand-delivered the Amended Order to a party whom BISHCA knew to be represented by counsel without counsel present. Such conduct violated the V.C.R.P. See VERMONT RULES OF PROF’L CONDUCT, R. 4.2. Further, 3 V.S.A. §812 requires that a copy of a decision or order be delivered or mailed to the party’s attorney. See 3 V.S.A. § 812. This was not done.

Appended to the Amended Order were two affidavits: one by Charles Piasecki, the Market Conduct Chief for the Insurance Division, and the other by Peter Yankowski, the Deputy Commissioner of the Insurance Division. Each affidavit alleged improper

conduct by BCBSVT that purportedly occurred after the issuance of the final Order. Such facts were not capable of review in the first proceeding having apparently occurred after the close of such proceeding.

The Division asserts in its Opposition that BCBSVT had no right to a proceeding before the issuance of the Amending Order because BCBSVT had the opportunity to participate in the proceeding leading to the final Order. However, the opportunity to be heard in the first proceeding does not amount to the opportunity to be heard in the second. See Thompson v. Smith, 119 Vt. 488, 508 (1957). After the issuance of the final Order, the matter was closed. All that remained for BISHCA to do was to resume regulatory oversight of BCBSVT. If, however, BISHCA believed BCBSVT's subsequent conduct violated its order, and if it sought to assess a fine on BCBSVT for conduct which was not the subject of the original proceeding, the correct course of action would have been to initiate another proceeding. For example, in a Public Service Board case involving Citizens Utilities Co. ("Citizens"), the Public Service Board (the "Board"), considered that Citizens had failed to comply with Board orders and had willfully refused to cooperate with the Board's regulatory investigations. In fact, that case involved forty-one days of hearings and two separate public hearings. The Board did not privately review and amend its previous order to regulate conduct following conclusion of an earlier proceeding. In contrast to the situation under review, the Board properly initiated an investigation and then provided notice and a hearing.

An administrative agency cannot review its own decisions or revoke action finally taken without notice or hearing. See Thompson v. Smith, 119 Vt. 488 (1957). "Otherwise there would be non-finality to the proceeding; the result would be subject to

change at the whim of the members [of the zoning board] or due to the effect of influence exerted upon them or other undesirable elements tending to uncertainty and impermanence.” See Thompson, 119 Vt. at 508, quoting St. Patrick’s Church Corp. v. Daniels, 113 Conn. 132 (1931).

In such a case, when a matter is closed pursuant to a final order after the expiration of the appeal period, the administrative agency is *without jurisdiction* to issue subsequent orders on the matter. See Thompson, 119 Vt. at 507. Any such subsequent orders are *coram non judice*, and void. See id.

IV. CONCLUSION

For all of the reasons stated above, BCBSVT strongly believes that the Amended Order should be modified by elimination of the \$20,000 penalty. In addition to the procedural concerns outlined herein, there is also a matter of fundamental fairness. In this case BCBSVT was working cooperatively with the BISHCA to implement a mandated change to its computer system. Essentially, BCBSVT had agreed to calculate interest in the manner required by BISHCA even though it strongly believes that such interpretation of 18 V.S.A. Section 9418 is inconsistent with the express statutory language. In fact, when checking with other BCBS plans throughout the country, it became clear that all of the so-called prompt pay statutes are calculated on the basis of simple interest. BCBSVT did not however appeal because of its interest in working with the Department and because it strongly believed that claims should be paid within the 45 day statutory period. In fact, the affidavit submitted by Mr. Warren indicates that BCBSVT has essentially accomplished that objective.

It is correct that there were difficulties providing claim information in the format sought by Mr. Piasecki. BCBSVT sought to accommodate Mr. Piasecki and even agreed (without question) to permit him to use NAIC software in an effort to validate BCBSVT claims data. Although Mr. Piasecki was apparently unsuccessful in his efforts to apply this software, there is no question about BCBSVT's willingness to try to facilitate his efforts.

Similarly, BCBSVT did have difficulty calculating past due interest and apprised Mr. Piasecki of that situation in early October. Although he inquired concerning the status of the payments, he did not express serious concern about the efforts being undertaken by BCBSVT in this regard. If at any point Mr. Piasecki had simply said immediately pay the outstanding interest, there is little doubt that that would have been the end result. However, BISHCA chose instead to punish BCBSVT and its subscribers by imposing an additional \$20,000 fine. It is important to bear in mind that the approximate amount of unpaid back interest was \$10,000, or 50% of the fine sought in the Amended Order. This result, in addition to being in violation of numerous procedural requirements, is also manifestly unfair.

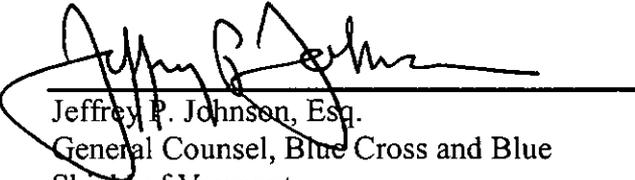
WHEREFORE, BCBSVT respectfully requests BISHCA withdraw its Amending Order of November 13, 2003.

DATED at Montpelier, Vermont this 29th day of December, 2003.

Respectfully submitted,

BLUE CROSS AND BLUE SHIELD OF
VERMONT

By:

A handwritten signature in black ink, appearing to read "Jeffrey P. Johnson", is written over a solid horizontal line. The signature is stylized and cursive.

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