

STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

PROFESSIONAL FIRE FIGHTERS OF NEW HAMPSHIRE & a.

v.

THE NEW HAMPSHIRE LOCAL GOVERNMENT CENTER & a.

**PETITION FOR WRIT OF MANDAMUS & OTHER
LEGAL AND EQUITABLE RELIEF**

NOW COME the Professional Fire Fighters of New Hampshire (“PFFNH”), by and through counsel, Molan Milner & Krupski, PLLC, and petition this Court for a Writ of Mandamus ordering the New Hampshire Local Government Center (“LGC”) and its subsidiary, LGC HealthTrust LLC (“HealthTrust”) to perform their duties under law, including the statutory obligation to return all excess earnings and surplus to participating local governments. PFFNH and the other named Petitioners, individually, as third party beneficiaries and as representing a putative class of active and retired firefighters, as financial contributors to and beneficiaries of the health insurance trust held as fiduciary by the LGC, also seek other legal and equitable relief, including the return to them of health insurance payments they have made to the LGC but utilized by LGC for purposes unrelated to the provision of health insurance.

I. INTRODUCTION

1. In this action, Petitioners seek damages in the form of health insurance payments made to the LGC and HealthTrust that were and continue to be utilized by the LGC for purposes unrelated to the procurement of health insurance. Petitioners also seek a Writ of Mandamus, ordering the LGC to strictly comply with the provisions of RSA 5-B:5, I (c) and return its ‘profits’ back to LGC member cities and towns. Petitioners seek the Writ of Mandamus individually and as third party beneficiaries of the contractual and statutory relationship between local New Hampshire governmental entities and the LGC.

II. PARTIES

2. Petitioner, the Professional Firefighters of New Hampshire (“PFFNH”) is a labor organization representing active and retired New Hampshire firefighters with an address of 25 Nashua Road in Londonderry, New Hampshire 03053.

3. Petitioner, William McQuillen is a full time Fire Lieutenant employed by the City of Portsmouth, New Hampshire and contributes 18% of his wages to the LGC for partial payment of the money required by LGC to be paid for the procurement of health insurance. Mr. McQuillen has an address of 9 Denise St., Portsmouth New Hampshire 03801.

4. Petitioner, Tom Cots is a retired Hampton firefighter who pays 100% of the cost of health insurance to the LGC by way of the medical subsidy he earned as a full time Hampton firefighter and by way of an \$820.79 dollar a month payment to LGC deducted directly from Mr. Cots’ pension check. Mr. Cots has an address of P.O. Box 482, Greenland, New Hampshire 03840.

5. Respondent LGC is a non-profit, tax exempt, quasi governmental body made up entirely of New Hampshire city, town and school administrative unit members and is managed by a board of directors made up entirely of public officials and employees. The LGC is located at 25 Triangle Park Drive, Concord, New Hampshire 03302-0617.

6. Respondent HealthTrust is a non-profit, tax exempt, quasi governmental entity wholly owned and managed by LGC and the LGC board of directors. HealthTrust is a pooled risk management trust organized pursuant to RSA 5-B with an address of 25 Triangle Park Drive, Concord, New Hampshire 03302-0617.

III. JURISDICTION AND VENUE

7. This Court has jurisdiction over the subject matter pursuant to ***RSA 498:1***. Venue is appropriate in Merrimack County because some of the parties have a principle place of residence or are a body politic within the County of Merrimack. ***RSA 507:9 III.***

IV. CLASS ACTION ALLEGATIONS

8. Petitioners intend to certify as a proposed class all active and retired firefighters employed (or formerly employed) by New Hampshire political subdivisions that pay a portion (or all) of the health insurance money paid to the LGC or HealthTrust for the procurement of health insurance as the number of putative plaintiffs is numerous (thousands) and joinder of all of them is impracticable.
9. Questions of law and fact common to the putative class predominate over any questions that may affect individual members.
10. The claims of the individual Petitioners are typical of the claims of the class.
11. Petitioners will fairly and adequately protect the interests of the class.
12. A class action is superior to any other available method to the fair and efficient adjudication of the issues presented.
13. The attorneys for the Petitioners will adequately represent the interests of the class.

V. STATUTORY PROVISION

14. The relevant statutory provisions concerning the Writ of Mandamus are as follows:

5-B:5 Standards of Organization and Operation. –

I. Each pooled risk management program shall meet the following standards of organization and operation. Each program shall:

- (a) Exist as a legal entity organized under New Hampshire law.
- (b) Be governed by a board the majority of which is composed of elected or appointed public officials, officers, or employees.
- (c) **Return all earnings and surplus in excess of any amounts required for administration, claims, reserves, and purchase of excess insurance to the participating political subdivisions.**
- (d) Provide for an annual audit of financial transactions by an independent certified public accountant. The audit shall be filed with the department and distributed to participants of each pooled risk management program.
- (e) Be governed by written bylaws which shall detail the terms of eligibility for participation by political subdivisions, the governance of the program and other matters necessary to the program's operation. Bylaws and any subsequent amendments shall be

filed with the department.

(f) Provide for an annual actuarial evaluation of the pooled risk management program. The evaluation shall assess the adequacy of contributions required to fund any such program and the reserves necessary to be maintained to meet expenses of all incurred and incurred but not reported claims and other projected needs of the plan. The annual actuarial evaluation shall be performed by a member of the American Academy of Actuaries qualified in the coverage area being evaluated, shall be filed with the department, and shall be distributed to participants of each pooled risk management program.

II. If a pooled risk management program fails to provide for an annual audit or an annual actuarial evaluation, the department shall perform or cause to be performed the required audit or evaluation and shall be reimbursed the cost by the program.

(emphasis added).

VI. STATEMENT OF THE FACTS

15. LGC is the successor organization to, and was formally known as, the New Hampshire Municipal Association (“NHMA”) which was formed in 1941 to provide legal, legislative advocacy and other services to its member groups, comprised of New Hampshire political subdivisions. See RSA 31:8-a (statute authorizing political subdivisions to pay dues to the NH|MA through appropriations by the legislative body).

16. HealthTrust was originally formed in 1984 by the NHMA and is a risk pool management trust established under RSA 5-B providing its members health, dental and other insurance coverages for their employees and retirees. HealthTrust is the country’s third largest risk pool program (there are more than 500 such pools nationwide) and takes in nearly 340 million public dollars from New Hampshire political subdivisions, public employees (through cost sharing arrangements), and retired public employees who pay 100 percent of the cost billed by HealthTrust (certain retirees do receive a medical subsidy to help cover this cost as part of their retirement benefits). HealthTrust is wholly owned by LGC and is managed by the LGC Board of Directors.

17. RSA 5-B was enacted in 1987 to address the fact that the purchase of traditional insurance from private companies was becoming cost prohibitive for New Hampshire public employers. Thus, RSA 5-B allowed New Hampshire’s political subdivisions to join together and establish a self insurance pool of money, from which claims would be paid. RSA 5-B:3.

18. As a public risk pool, HealthTrust is designed by statute to operate as a nonprofit entity and it is exempt from local, State and Federal taxes. Thus, any “profit” realized by HealthTrust must be returned to the participating political subdivisions. RSA 5-B:5,I(c) requires HealthTrust to “[r]eturn all earnings and surplus in excess of any amounts required for administration, claims, reserves, and purchase of excess insurance to the participating political subdivision”.

19. Indeed, according to HealthTrust, it “believes operating without profit seeking contributes to its ability to deliver products to public sector employers and employees at lower charges than might otherwise be obtained from comparable products”. HealthTrust Financial Statement, Management Discussion and Analysis (December 31, 2008).

20. As a result, however, of decisions made by LGC in retreats conducted in 2003 and 2004, HealthTrust began retaining “profits” whereby, as of December 31, 2008, (1) HealthTrust transferred more than 14 ½ million dollars of member contributions paid to HealthTrust for health insurance over to LGC; and (2) HealthTrust has amassed over 132 million dollars in net assets.

21. Since 2003, LGC has utilized monies paid to HealthTrust by participating political subdivisions (and their employees and retirees) for the purpose of procuring health insurance coverage for other endeavors unrelated to the procurement of health insurance. These endeavors include using over 10 million dollars of health insurance money to fund and support LGC’s workers’ compensation risk pool and over 3.6 million dollars to build and finance expansions to LGC’s office buildings (office space for which HealthTrust paid LGC \$194,000 dollars in rent in 2008).

22. The 2003 and 2004 retreats established this “strategic plan” which, as stated by LGC, is funded by using “1% of HealthTrust ...contributions toward the expansion and enhancement of related services ... including the establishment of a Workers’ Compensation program”. Local Government Center, Summary of 2003/2004 Strategic Decisions (December 8, 2009). In 2008 , for example, HealthTrust reported member contributions collected at \$342,990,820 and contributions to its “parent” LGC totaling \$3,639,015 or a little more than one percent of the money paid to HealthTrust for health insurance by cities and town and their active employees and retirees.

23. LGC uses health insurance contributions made by cities and towns, their employees and retirees to HealthTrust to fund a workers' compensation pool even though: (1) not all LGC member political subdivisions participate in the workers' compensation pool; (2) retirees are not covered by workers' compensation insurance; (3) excess health insurance contributions must be returned to the participating political subdivision (RSA 5-B:5, I(c)); and (4) public employers who self insure workers' compensation coverage (through the use of LGC's workers' compensation risk pool, for example) may only fund that pool through appropriations made by their legislative bodies specific for such a purpose (RSA 281-A:11). The 2007/2008 Consolidated Financial Statement of LGC describes the funding this way:

“The premium deficiencies for Property-Liability Trust programs are mitigated by the continued support of the Local Government Center’s Board of Directors. During the years ended December 31, 2008 and 2007, the Board of [LGC] authorized contributions to Property-Liability Trust of \$2,768,304 and \$3,999,359, respectively, to fund the premium deficiencies and support the operations of the workers’ compensation program”.

24. In addition to the Workers' Compensation initiative, LGC's "strategic plan" also includes as a priority "leveraging the overall financial strength of LGC to benefit all programs without creating additional risk". Local Government Center, Summary of 2003/2004 Strategic Decisions (December 8, 2009). The financial strength of LGC is manifested through the strategic plans "implementation program" which includes the hiring of additional attorneys, program administrators, staff accountants, human resource professionals, and other member service executives and account representatives. Id. In large measure due to contributions made to LGC by HealthTrust (its largest payor), LGC was also able to pay in 2009 its top executives high six figure salaries and pay its outgoing executive director over \$200,000 in salary as well as a generous defined benefit pension for life.

25. The overall strength of LGC is manifest, as well, by the financial condition of HealthTrust: (1) HealthTrust is the nations third largest risk pool; (2) in 2008, HealthTrust's actuary calculated its necessary reserves at 22 million dollars but HealthTrust retained **an additional** 61 million dollars in "Risk Based Capital" or "RBC"; (3) in 2008, LGC retained an additional 7 million dollars for "future administrative needs" ;(4) in 2008, HealthTrust realized a net gain of \$149,133 dollars in the sale of investment securities; and (5) in 2007 and 2008, HealthTrust paid LGC over 15 million dollars for administrative services which included nearly

1.7 million dollars to establish and fund a new LGC employee defined benefit plan (as well as the payment of LGC's Unfunded Accrued Liability (UAL) for that plan of \$792,938).

26. In response to concerns regarding the "strategic plan" and the use of health insurance money for unrelated purposes, the LGC in 2006 sent a letter to lawyers representing PFFNH and stated that the LGC Board did not approve of funding the strategic plan by using employee contributions paid for health insurance. The then executive director of LGC explained that LGC staff was reviewing collective bargaining agreements to ascertain an "average" employee cost share for health insurance and that the 1 percent payment for the strategic plan would be adjusted accordingly. The "average" cost share level was estimated by LGC staff to be 12%. Thus, in 2005 and 2006, HealthTrust's contributions to the 'strategic plan' constituted .88% of total contributions.

27. Despite these efforts to "carve out" employee money from the strategic plan, the LGC has not segregated in any fashion the pool of health insurance money; thus the .88% of contributions paid over to the LGC for the "strategic plan" would still constitute monies paid by employees. Second, the 12% figure is an estimate based on incomplete information and in no way assures that employee money is not used for the "strategic plan". In fact, LGC admits that the database it utilized for the calculation has been lost by the LGC. In any event, the LGC abandoned this 12% carve out process in 2007 and 2008 where 1.37% and 1.05% of member contributions were paid over to the LGC. On information and belief, HealthTrust continues to pay over 1 percent of member contributions (including employee and retiree payments) to support the LGC's strategic plan.

28. As well, LGC has not even attempted to "carve out" monies paid by retirees to HealthTrust for health insurance. According to an LGC staff memorandum prepared in 2006 explaining the "carve out" percentage, retirees:

"were not added because LGC did not know how much the person, municipality or NHRS was sharing the premium. The work did not discern early retirees from active subscribers if they were in a mixed, general BlueChoice, Indemnity or HMO Blue Group. In such circumstances, **retirees were treated as contributing in the same manner as an active employee**". (emphasis added).

29. Retirees purchase health insurance through the LGC under the statute that requires public employers to offer health insurance to its retirees under the same group plan or plans offered to

active employees. RSA 100-A:50. However, the public employer is not obligated to contribute to any portion of the cost of such health insurance. Rather, in the vast majority of cases, retirees pay 100% of the cost of their health insurance by way of the medical subsidy provided as part of their pension and the balance is usually paid as a reduction in the pension check which is directly paid over to the LGC. RSA 100-A:51. Thus, retiree payments to LGC are not carved out by way of the estimated 12% methodology, which, again, has been abandoned in any event by the LGC beginning in 2007.

30. As stated within the Bylaws of LGC, HealthTrust is obligated to hold the contributions paid to it in trust and utilize those funds only as permitted by the trust's "operative documents" (i.e., the Bylaws and other Operating Agreements). The Bylaws require HealthTrust to act in strict accordance with its stated mission to provide health benefits to its participants and their employees. The LGC Board of Directors are required, moreover, to administer HealthTrust by creating a reserve for the payment of benefits and claims and to assure compliance with RSA 5-B. As well, the Bylaws state that the LGC's net assets "accrue to the Members as earned".

31. The LGC breaches the terms of this trust when it removes trust funds and spends that money on "strategic plans" and not for the purposes on which the money was paid into the trust.

VII. CAUSES OF ACTION

A. MANDAMUS

32. The Petitioners adopt and reallege each and every factual allegation as contained in paragraphs 1 through 31.

33. Mandamus is a common law writ which allows this Court to order public officials or agencies (and quasi public officials and bodies) to perform their duty according to law, including RSA 5-B.

34. Petitioners are without other adequate relief at law or in equity.

35. Petitioners have standing to petition for the writ of mandamus as beneficiaries of HealthTrust and in the place of LGC participating political subdivisions as Petitioners are third party beneficiaries of the contractual and statutory relationship between LGC and its members.

B. RSA 5-B:5,I(c)

36. Petitioners adopt and reallege each and every allegation as contained in paragraphs 1 through 35.

37. Petitioners have an implied right of action against LGC and HealthTrust for violating RSA 5-B by refusing to return all earnings and surplus in excess of any amounts required for administration, claims, reserves, and purchase of excess insurance to the participating political subdivisions. Petitioners, as employees and retirees of these political subdivisions, constitute “a class the statute is designed to protect and the injury is of the type the statute is intended to prevent.” Marquay v. Eno, 139 N.H. 708, 713 (1995) citing, Island Shores Estates Condo. Assoc. v. City of Concord, 136 N.H. 300, 307 (1992).

38. LGC and HealthTrust violate RSA 5-B:5,I(c) when they use health insurance money to fund ‘strategic plans’ and the exorbitant salaries and benefits for LGC executives.

C. DECLARATORY RELIEF

39. The Petitioners adopt and reallege each and every allegation as contained in paragraphs 1 through 38.

40. The Petitioners enjoy certain rights and benefits under RSA 5-B and HealthTrust and LGC claim adversely to those rights when they refuse to return excess earning and surplus back to their participating members. Petitioners seek a declaratory ruling from this Court that HealthTrust has violated the terms of RSA 5-B and are enjoined from using excess funds and surplus to finance the “strategic plan” or the unreasonable salaries and benefits to LGC executives.

D. BREACH OF CONTRACT

41. The Petitioners adopt and reallege each and every allegation as contained in paragraphs 1 through 40.

42. Petitioners are third party beneficiaries to the contracts between LGC and their participating member political subdivision. LGC and HealthTrust have breached the terms of the LGC bylaws and other operative documents by, inter alia, not returning excess earnings and surplus to its members and by retaining and amassing millions of dollars in net assets that should accrue to the benefit of the members as earned. Petitioners are damaged by this breach of contract.

E. BREACH OF FIDUCIARY RESPONSIBILITY/BREACH OF TRUST

43. Petitioners adopt and reallege each and every allegation contained in paragraphs 1 through 42.

44. A breach of a fiduciary relationship occurs when “influence has been acquired and abused or confidence has been reposed and betrayed”. Lash v. Cheshire County Savings Bank, 124 N.H. 435, 438 (1984) (citation omitted). As well, the LGC and HealthTrust serve as Trustees over money held in trust for the benefit of its members and their employees and retirees. The existence of the trust relationship gives rise to potential breach of fiduciary duty claims. Gilbert v. Atlantic Trust Co. N.A., 2006 WL 1049707 (DNH April 19, 2006).

45. The LGC bylaws and other operative documents establish that LGC and HealthTrust act as fiduciaries to not only the participating political subdivisions, but to active employees and retirees as well. The mission of HealthTrust, for example, is to provide health benefits to Participants “for their employees”.

46. The LGC and HealthTrust have violated the fiduciary duty owed to its members and their employees and retirees to their detriment.

F. RSA 358-A CONSUMER PROTECTION

47. Petitioners adopt and reallege each and every allegation contained in paragraphs 1 through 46.

48. LGC and HealthTrust are “persons” as defined by RSA 358-A:I.

49. The procurement and sale by LGC and HealthTrust of health insurance benefits to New Hampshire political subdivisions constitute “trade” and “commerce” as defined by RSA 358-A:1,II.

50. The procurement and sale of health insurance to New Hampshire political subdivisions is not an exempt transaction under RSA 358-A:3.

51. The conduct of LGC and HealthTrust as described herein, including, but not limited to, the use of health insurance payments to fund other endeavors and the failure to return to LGC participating members and their employees and retirees money held by LGC and HealthTrust as excess earnings and surplus constitutes an unfair and deceptive act or practice. RSA 358 –A:2.

52. Petitioners have been and continue to be injured by LGC and HealthTrust due to their willful and knowing unfair and deceptive acts or practices and are entitled to actual damages, treble damages and attorney fees. RSA 358-A:10.


WHEREFORE, Petitioners respectfully request that this Honorable Court:

- A. Certify this case as a class action pursuant to Superior Court Rule 27-A and / or RSA 358-A:10-a;
- B. Issue a Writ of Mandamus directing the LGC and HealthTrust to perform what is a ministerial duty to “[r]eturn all earnings and surplus in excess of any amounts required for administration, claims, reserves, and purchase of excess insurance to the participating political subdivisions”, RSA 5-B:5, I (c);
- C. Find that Petitioners have a private right of action under RSA 5-B;
- D. Find and declare that Petitioners are third party beneficiaries to the contractual and statutory relationship between LGC and its political subdivision members;
- E. Find and declare that the actions of the LGC and HealthTrust violate RSA 5-B;
- F. Find that the actions of LGC and HealthTrust constitute breach of contract a breach of fiduciary duty;
- G. Find that the actions of LGC and HealthTrust constitute unfair and deceptive acts or practices under RSA 358-A;
- H. Enter a damage award that includes actual damages, enhanced damages, disgorgement and attorney fees;
- I. Enjoin LGC and HealthTrust from future unfair and deceptive acts or practices under RSA 5-B and RSA 358-A; and/or
- J. Enter such orders as is just.

Dated: March 11, 2010

Respectfully submitted
Professional Fire Fighters of New Hampshire, et al.
Through Counsel,
Molan, Milner & Krupski, PLLC

By:



Glenn R. Milner, Esq.
NH Bar # 5568
100 Hall Street, Suite 101
Concord, NH 03301
(603) 410-6011