

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF INSURANCE, SECURITIES AND BANKING

IN THE MATTER OF

Surplus Review and Determination for Group Hospitalization and Medical Services, Inc.

D.C. APPLESEED'S MOTION TO INTERVENE AS A PARTY,
MOTION TO MODIFY SECOND SCHEDULING ORDER, AND
MOTION TO MODIFY STANDARD HEARING PROCEDURES

Pursuant to the Commissioner's Second Scheduling Order of May 19, 2014, in the above-captioned proceeding (the "Second Scheduling Order"), Order No. 14-MIE-002, the D.C. Appleseed Center for Law and Justice, Inc. ("DC Appleseed") hereby requests that DISB recognize it as a party to the surplus review proceeding with full participation rights. DC Appleseed also requests that the Commissioner modify the second scheduling order by increasing the page limit applicable to DC Appleseed's written report. Finally, whether or not DC Appleseed is afforded party status, DC Appleseed requests the right to make a closing statement at the hearing in this matter currently scheduled for Wednesday, June 25, 2014.

Given the imminent June 10, 2014 deadline for filing hearing reports, DC Appleseed urges the Commissioner to address this and any other motions concerning the Second Scheduling Order as soon as possible to permit the participants in that hearing to prepare adequately. In particular, we urge the Commissioner to make a prompt determination regarding our request to increase the page limit so that we may have adequate time to prepare our submission.

Introduction

The Second Scheduling Order invited any person or entity other than Group Hospitalization and Medical Services, Inc. ("GHMSI") requesting (a) status as a party for the

hearing scheduled for June 25, 2015, (b) modification of the scheduling order, or (c) any modification of standard hearing procedures to do so by written submission on or before Friday, May 30, 2014. By this motion, DC Appleaseed requests (I) that if DISB does not view DC Appleaseed as a party to the current proceeding, that DISB grant DC Appleaseed party status for this hearing with full participation rights, (II) that DC Appleaseed be permitted to submit a report of 50 pages in length rather than 15, in addition to appending reports from its experts, and (III) that, whether or not the Commissioner grants DC Appleaseed party status, the Commissioner permit DC Appleaseed to make a closing statement at the hearing.

DC Appleaseed is an independent nonprofit advocacy organization incorporated in 1994 under the Nonprofit Corporation Act of the District. It is dedicated to making the District of Columbia and the Washington metropolitan area (the area essentially congruent with GHMSI's geographic service area) better places to live and work, including by promoting the availability, accessibility, and affordability of health insurance and health care.

ARGUMENT

I. Appleaseed is already a party to this proceeding; if DISB disagrees, DISB should grant Appleaseed party status.

Under the District of Columbia Administrative Procedure Act (D.C. APA), the term “party” includes “any person . . . properly seeking and entitled as of right to be admitted as a party, in any proceeding before . . . an agency . . .” D.C. CODE § 2-502. Similarly, under DISB regulations governing contested case hearings before the agency, a “party” is “any person or agency named or admitted as a party, in any proceeding before the Commissioner . . .” D.C. MUN. REGS. tit. 26-A § 3819.

The D.C. Court of Appeals held that a surplus review under MIEAA is a “contested case” within the meaning of the D.C. APA. D.C. CODE § 2-510(a). The court explained that MIEAA

requires a hearing prior to a surplus determination, which is adjudicatory in nature. *D.C. Appleseed Ctr. for Law and Justice, Inc. v. Dist. of Columbia Dep't of Ins. Secs., and Banking*, 54 A.3d 1188, 1199 (D.C. 2012). By definition, contested cases are proceedings in which the “legal rights, duties, or privileges of *specific parties* are required by any law . . . to be determined after a hearing” D.C. CODE § 2-502(8) (emphasis added). Thus, party status is an integral aspect of contested case proceedings. Although the MIEAA statute and regulations do not define the term “party,” this term should be interpreted as it is defined under the D.C. APA and DISB’s Rules of Practice and Procedure for Hearings.

There is a well-developed test for determining who is entitled to be admitted as a party in formal agency proceedings such as this one. The usual approach of administrative agencies (both District agencies and federal agencies) is to apply the well-developed tests for judicial standing. *See Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601, 613–14 (D.C. Cir. 1978) (Bazelon, J., concurring) (“[I]f a party would have standing to seek judicial review of administrative action, he should be allowed to appear before the agency, if only to assure proper development of the record”); *see also* 73A C.J.S. Public Administrative Law and Procedure § 334 (noting that the standards for administrative standing are more lenient than those relating to judicial review).

The D.C. Court of Appeals has already determined that DC Appleseed has standing to seek judicial review of the Commissioner’s decision in the surplus review proceeding and thus, it is clear that DC Appleseed is a party to this proceeding. As described by the District of Columbia Court of Appeals, DC Appleseed has been the driving force behind efforts to ensure that GHMSI fulfills its obligations as a nonprofit charitable entity. *D.C. Appleseed*, 54 A.3d at 1208. These efforts include a challenge to the efforts to convert to for-profit status, the passage

of the MIEAA (the statute whose implementation is at issue in this proceeding), participation in the previous surplus hearing in 2009, a successful appeal of that determination before the Court of Appeals, and extensive engagement with DISB, its consultants, and GHMSI in preparation for the upcoming surplus review hearing.

Based on this extensive record of engagement, the D.C. Court of Appeals determined that DC Appleseed had judicial standing to challenge the prior Commissioner’s surplus determination. *D.C. Appleseed*, 54 A.3d at 1208. Specifically, the court held that DC Appleseed’s “long-time particip[ation] in DISB proceedings involving GHMSI,” satisfied the rigorous constitutional and prudential requirements to assert organizational standing. *Id.* at 1208-09 n.27. The court explained that “Appleseed is not just one of any number of organizations with an interest in enforcement of the MIEAA.” Rather, a determination by DISB that erroneously interprets and applies MIEAA would “undo the dogged and concrete work that Appleseed has undertaken over a number of years to establish and enforce the legal structure created by the MIEAA so as to enhance the availability of affordable health care and promote public health in the District of Columbia.” *Id.* at 1208. Thus, “in light of its long and dedicated pursuits of the benefits to improved access to health care in the District of Columbia that would flow from greater community investment by GHMSI,” the court found that a “faulty interpretation and implementation of the MIEAA would inflict ‘concrete and demonstrable injury’ to [DC Appleseed’s] activities.” *Id.* quoting *Havens Realty. Corp. v. Coleman*, 455 U.S. 363, 379 (1982).¹

¹ The court also held that that, as a subscriber of GHMSI insurance, DC Appleseed stands to benefit from a determination that GHMSI’s surplus is excessive. *Id.* at 1204.

In short, the Court of Appeals has already ruled that Appleseed had standing to challenge the last surplus review. Appleseed thus has administrative standing as a party in this contested case proceeding.

If, notwithstanding the prior decisions of the D.C. Insurance Commissioner and the D.C. Court of Appeals, Commissioner McPherson concludes that DC Appleseed is not yet a party to this proceeding, we urge the Commissioner to grant DC Appleseed party status with full participation rights in accordance with the regulations governing contested cases before the DISB. *See* D.C. MUN. REGS. tit. 26 § 3808.

II. DISB should grant DC Appleseed an increase in the applicable page limit.

Whether or not DISB finds that DC Appleseed is a party to this proceeding, DISB should allow DC Appleseed to submit a written pre-hearing report of up to 50 pages, the page limit granted to GHMSI. The MIEAA regulations contemplate that GHMSI and members of the public may submit a written report for consideration by the Commissioner. *Id.* at § 4602.2. GHMSI may submit a report of no more than 50 pages, while members of the public are limited to 15 pages. *Id.* However, as noted above, the D.C. Court of Appeals explained that DC Appleseed is “not just” a member of the public, nor is it “just one of any number of organizations with an interest in enforcement of the MIEAA.” *D.C. Appleseed*, 54 A.3d at 1210. Rather, ensuring the proper implementation of MIEAA is part of Appleseed’s “organizational mission.” *Id.* Thus, DC Appleseed should receive more pages than are contemplated for “members of the public.” Instead, DC Appleseed requests that it be allowed a submission of 50 pages, separate from attachments that will accompany the report from DC Appleseed’s experts.

The need for an extension of the page limit is underscored by the volume of materials that DISB, Rector, and Appleseed have exchanged to date. DC Appleseed has submitted multiple requests for additional information based on questions raised by the Rector Report, and has

engaged in two conference calls with Rector. While Appleseed has not received all of the information it believes is necessary, Rector and DISB have exchanged reams of paper, including highly detailed and technical questions and responses. It is not feasible, therefore, for Appleseed to fully respond to all the questions raised by the Rector Report and in these subsequent filings in just 15 pages.

Moreover, DC Appleseed should be allowed additional pages because a detailed and comprehensive filing by Appleseed will assist the Commissioner in reaching a full and fair determination regarding GHMSI's surplus. As we have explained previously, the Court of Appeals has held the Commissioner to a very high standard of explanation regarding this determination, where "even a small variance can implicate millions of dollars." *D.C. Appleseed*, 54 A.3d at 1219. This proceeding involves discrete issues each of which implicates at least tens and, for some, hundreds, of millions of dollars. Each such issue, resting on considerations specific to it, deserves thorough treatment in the pre-hearing report. And, as the Court of Appeals held, the more technical the subject matter and the actuarial reports on which the Commissioner relies for his determination, the greater is his burden of explanation. *Id.* at 1217.

DC Appleseed is in a unique position to assist the Commissioner by presenting a detailed, comprehensive filing that presents additional analysis of GHMSI's surplus and the legal requirements governing the Commissioner's decision. This will aid the Commissioner in reaching a final determination and crafting a robust explanation that is sufficient under the Court of Appeals' high standard. DC Appleseed has retained a leading actuarial expert who has delved deeply into GHMSI's public filings, the Rector report, and the additional information provided in the course of discovery between Appleseed and DISB. Given DC Appleseed's longstanding participation in these proceedings, and its uniquely active role on behalf of health care

consumers in the District of Columbia, the Commissioner should have before him a complete presentation of DC Appleseed's analysis.

III. DC Appleseed requests full participation rights, including the right to make a closing statement.

The scheduling order invited parties to seek modification of "standard hearing procedures." As we understand it, several statutory and regulatory provisions dictate the standard hearing procedures that will govern the surplus review proceeding.

The D.C. APA outlines certain procedural requirements for contested case proceedings. Additionally, the Revised Notice of Public Hearing provided in particular that the surplus review proceeding would be governed by both the Department's Rules of Practice and Procedure for Hearings, D.C. MUN. REGS. tit. 26 § 3800.1 *et seq.*, and the Procedures for the Determination of Excess Surplus, *Id.* § 4601 *et seq.* See Notice of Public Hearing – Revised (May 2, 2014).

The Department's Rules of Practice outline the conduct of hearings generally. For example, hearings are to be open to the public although the Commissioner may, for good cause, grant requests to keep confidential any "proprietary or personal" information introduced as evidence at the hearing. D.C. MUN. REGS. tit. 26 § 3808.2. After calling the hearing to order, the Commissioner shall explain the purpose and nature of the hearing and may allow the parties to present preliminary matters. *Id.* § 3808.3(a)–(c). The parties may make opening statements, the Commissioner states the order of the presentation of evidence, and witnesses may be sworn. *Id.* § 3808.3(d)–(f). In addition, parties may make closing arguments. *Id.* § 3803(g).

The MIEAA regulations, *id.* § 4601 *et seq.*, provide that GHMSI and, at the discretion of the Commissioner, interested members of the public, may make oral presentations. *Id.* § 4602.3(b)–(c). The Commissioner may directly, or through independent experts question

witnesses or interested persons making a presentation. *Id.* § 4602.3(d). The corporation is allowed to make a final statement not to exceed thirty minutes. *Id.* § 4602.3(e).

Appleseed understands that the hearing procedures used at the September 2009 surplus review hearing, which reflected the procedures outlined in the MIEAA regulations, may inform how the Commissioner conducts the current surplus review proceedings. During the 2009 hearing, GHMSI was permitted to make an oral presentation of up to 90 minutes, as were DC Appleseed and interested third parties. Only GHMSI was permitted to make a closing statement.

As outlined in Part I, *supra*, Appleseed is a party to this proceeding or is entitled to be admitted as a party, and thus should enjoy full participation rights as a party, as governed by the D.C. APA and the Department's Rules of Practice and Procedure for Hearings. This is especially true given DC Appleseed's extensive and long-running involvement in these proceedings, as outlined in Part I. Full participation rights are vital to protect the concrete interests DC Appleseed has in the proceedings.

Whether or not the Commissioner finds that Appleseed is a party, Appleseed requests that it be permitted to make a closing statement at the hearing. Although the MIEAA regulations do not explicitly provide for persons other than GHMSI to make closing statements, we believe that given DC Appleseed's prior involvement and participation, it should be permitted to make such a statement.

CONCLUSION

For the reasons outlined above, DC Appleseed urges the Commissioner to recognize DC Appleseed a party to these proceedings with full participation rights. DC Appleseed also requests that it be permitted to submit a pre-hearing report of up to 50 pages. Finally, DC Appleseed requests the right to make a closing statement at the hearing.

Respectfully submitted,



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