IN THE COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 15-AA-108
DISTRICT OF COLUMBIA
APPLESEED CENTER FOR LAW
AND JUSTICE, INC.,

Petitioner,

14 MIE 012

and

No. 15-AA-109
GROUP HOSPITALIZATION
AND MEDICAL SERVICES, INC.,

Petitioner,

14 MIE 014

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF INSURANCE
SECURITIES AND BANKING,

Respondent.

PETITIONER D.C. APPLESEED'S RESPONSE TO THE COURT'S MARCH 16, 2015 ORDER TO SHOW CAUSE

On March 16, 2015, this Court ordered petitioners D.C. Appleseed Center for Law and Justice, Inc. ("D.C. Appleseed") and Group Hospitalization and Medical Services, Inc. ("GHMSI") to "show cause why their respective petitions should not be dismissed for having been taken from a non-final order" because GHMSI "has not yet submitted its plan for dedication of the allegedly excess surplus to the commissioner for approval." Mar. 16, 2015 Order ("Show Cause Order") at 1. As set forth below, this Court should hold the petitions for review in abeyance pending resolution of GHMSI's community reinvestment plan, which is the

second phase of analysis required by the District's governing Medical Insurance Empowerment Amendment Act of 2008 ("MIEAA").

BACKGROUND

Congress chartered GHMSI in 1939 as a "charitable and benevolent institution," Pub. L. No. 76-395 § 8, 53 Stat. 1412, 1414 (1939), to provide "health care services and medical insurance," *D.C. Appleseed Ctr. for Law & Justice, Inc. D.C. Dep't of Insurance, Securities & Banking*, 54 A.3d 1188, 1192 (D.C. 2012). In 1993, Congress amended GHMSI's charter "to place GHMSI under the District's regulatory authority . . . ." *Id. See also* Pub. L. No. 103-127 § 138, 107 Stat. 1336 (1993).

In 2004, D.C. Appleseed issued a report concluding that "GHMSI has not been meeting [its] charitable obligation" and that "the D.C. Attorney General had authority to enforce [GHMSI's] charitable mission." *D.C. Appleseed*, 54 A.3d at 1193. "Appleseed's report spurred activity by officials of the District of Columbia and by the Council of the District of Columbia." *Id.* Ultimately, "[d]issatisfied with the state of affairs, on January 23, 2009, the Council of the District of Columbia passed [MIEAA], D.C. Law 17-369." *Id.* at 1194.

Pursuant to MIEAA, review of GHMSI's surplus and its community reinvestment obligations proceeds in two stages. In the first instance, the Commissioner of the District's Department of Insurance, Securities and Banking ("DISB") "shall, on a basis no less frequently than every 3 years, review the portion of the surplus of [GHMSI] that is ***attributable*** to the District and may issue a determination as to whether the surplus is ***excessive***." D.C. Code § 31-3506(e) (emphases added). In conducting that review,

> The surplus may be considered excessive only if:
>
> (1) The surplus is greater than the appropriate risk-based capital requirements as determined by the Commissioner for the immediately preceding calendar year; and

> (2) After a hearing, the Commissioner determines that the surplus is unreasonably large and inconsistent with the corporation's obligation [to engage in community health reinvestment to the maximum feasible extent consistent with financial soundness and efficiency.]

Id. (referencing D.C. Code § 31-3505.01).

In accordance with MIEAA, the Commissioner initiated a review of GHMSI's surplus as of December 31, 2008. *See* 56 D.C. Reg. 5967 (2009). Following briefing by GHMSI and D.C. Appleseed as well as a public hearing, the Commissioner issued an October 2009 decision and order concluding that GHMSI's surplus was "neither unreasonably large nor excessive" under MIEAA. *See D.C. Appleseed*, 54 A.3d at 1198. D.C. Appleseed petitioned this Court for review of the Commissioner's decision. On September 13, 2012, the Court held that the Commissioner failed to apply MIEAA correctly or adequately explain her decision. Accordingly, the Court reversed the Commissioner's decision in part and remanded to the Commissioner.

Prior to the Court's decision, the Commissioner had begun a review of GHMSI's surplus as of December 31, 2011. *See* December 30, 2014 Decision and Order, Order No. 14-MIE-012 ("Dec. 2014 Order") at 6, *available at* http://disb.dc.gov/node/771622. Upon remand of the Commissioner's 2008 surplus determination by the Court of Appeals in 2012, the Commissioner "determined that further review of the 2008 surplus would be moot" and continued instead with the 2011 surplus review. *Id.* On June 25, 2014 the Commissioner held a public hearing on GHMSI's 2011 surplus. *See id.* at 6–8 (describing briefing and discussions leading up to the hearing). Further briefing followed the hearing. *See id.* at 8–9.

On December 30, 2014, the Commissioner issued a final decision and order on GHMSI's surplus as of December 31, 2011. *See id.* The Commissioner's Dec. 2014 Order found that GHMSI's 2011 "surplus attributable to the District as of December 31, 2011 was 'excessive' as defined by [MIEAA]. Specifically, GHMSI's surplus . . . was 998% RBC-ACL, whereas the

appropriate level was 721% RBC-ACL." *Id.* at 66. In other words, GHMSI's surplus was 38%, or $267.6 million, higher than it needed to be to meet the statutory standard of "financial soundness." D.C. Code § 31-3506(e).

Both D.C. Appleseed and GHMSI moved for reconsideration of the Dec. 2014 Order, asserting various errors in the Commissioner's implementation or interpretation of MIEAA in determining GHMSI's excessive surplus attributable to the District. The Commissioner accepted, considered, and denied both motions. 14-MIE-013 Order (Jan. 15, 2015), *available at* http://disb.dc.gov/node/771622; 14-MIE-014 Order (Jan. 28, 2015), *available at* http://disb.dc.gov/node/771622.

The Dec. 2014 Order triggered the second stage of MIEAA review. Having found an excessive surplus attributable to the District, the Commissioner ordered GHMSI to submit "a plan for dedication of the excess surplus attributable to the District to community health reinvestment," Dec. 2014 Order at 66, by March 16, 2015, *see* 14-MIE-014 Order at 2–3. Under MIEAA and DISB's implementing regulations, at this second stage of MIEAA review the Commissioner "shall approve the plan if it is ***fair and equitable*** as determined by the Commissioner." 26-A DCMR § 4603.2 (emphasis added). *See also* D.C. Code § 31-3506(g)(1). On March 16, 2015, GHMSI submitted its plan in response to the Dec. 2014 Order. *See* GHMSI Plan Pursuant to Dec. 30, 2014 Order No. 14-MIE-012 (Mar. 16, 2015), *available at* http://disb.dc.gov/node/771622. The Commissioner is now reviewing GHMSI's plan in light of the statutory and regulatory standard.

Under these circumstances, the Court directed D.C. Appleseed and GHMSI to "show cause why their respective petitions should not be dismissed for having been taken from a non-final order." Show Cause Order at 1. Although the Court premised the Show Cause Order, in

part, on the fact that GHMSI "has not yet submitted its plan for dedication of the allegedly excess surplus," Show Cause Order at 1, GHMSI has now submitted a plan in response to the Commissioner's Dec. 2014 Order. The Commissioner, however, has not concluded his review of that plan or his statutory and regulatory obligations with respect to the plan.

DISCUSSION

Under the D.C. Administrative Procedure Act ("D.C. APA"), "[a]ny person suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of the Mayor or an agency in a contested case, is entitled to a judicial review thereof . . . ." D.C. Code § 2-510(a). An "order" is "the whole or any part of the ***final*** disposition (whether affirmative, negative, injunctive, or declaratory in form) of the Mayor or of any agency in any matter other than rulemaking, but including licensing." *Id.* § 2-502(11) (emphasis added). The D.C. APA thus commits a final disposition to this Court's review.

This Court has further explained that, "[t]o be considered final, and to trigger a right of appellate review, an [administrative] order in a contested case must impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process." *Levy v. D.C. Bd. of Zoning Adjustment*, 570 A.2d 739, 749 n.14 (D.C. 1990) (finding decision approving proposed traffic plan reviewable where it "clearly fixes legal relationships" (quoting *Potomac Elec. Power Co. v. Pub. Serv. Comm'n*, 455 A.2d 374, 377–78 (D.C. 1982)) (citing *Washington Urban League v. Pub. Serv. Comm'n*, 295 A.2d 906, 908 (D.C. 1972)). For purposes of judicial review, "the finality of an agency order depends upon the nature of the order rather than its chronology in relation to the whole of the agency proceedings." *Goodman v. Pub. Serv. Comm'n*, 467 F.2d 375, 377 (D.C. Cir. 1972).[1]

[1] In other words, the order need not be the last order to be issued in an individual proceeding. *See Office of the People's Counsel v. PSC of the Dist. of Columbia*, 21 A.3d 985,

Under these principles, the Commissioner's Dec. 2014 Order poses a close question of finality. As detailed above, MIEAA involves two separate determinations. The first involved the Commissioner's determinations under MIEAA of the amount of "excess" surplus being held by GHMSI, and of the portion of that excess "attributable to the District."[2] In response to motions for reconsideration, the Commissioner declined to re-visit the amount of excess or the portion attributable to the District, or reconsider the Dec. 2014 Order. *See supra* p. 4. Nevertheless, GHMSI's plan regarding **how** to distribute the excessive surplus attributable to the District remains under review with the Commissioner, and the second determination under MIEAA is therefore ongoing. But the determination regarding distribution of the surplus involves a separate standard—whether the plan is "fair and equitable," 26-A DCMR § 4603.2; D.C. Code § 31-3506(g)(1)—from the Dec. 2014 Order's determination that there is an excessive surplus.

In this context, the Dec. 2014 Order may be characterized as either (1) finally "impose[ing]" upon GHMSI the legal "obligation" to reinvest the excessive surplus attributable to the District as finally fixed by the Commissioner in "consummation of the administrative process" involving the standards governing determination of GHMSI's surplus; or (2) an interlocutory step in an administrative process that will not be "consummat[ed]" until the Commissioner completes his review of GHMSI's community reinvestment plan and orders GHMSI to implement its reinvestment. *See Levy*, 570 A.2d at 759 n.14. The Court, however,

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989 (D.C. 2011) ("[I]t is not necessary that an order be issued at the conclusion of a proceeding; a 'final' order may be issued and reviewed at any point during [an agency] proceeding." (quoting *Potomac Elec. Power*, 455 A.2d at 378)).

[2] Under MIEAA, surplus is "excessive" when it is "greater than the appropriate risk-based capital requirements . . . for the immediately preceding calendar year" and "unreasonably large and inconsistent with the corporation's obligation," D.C. Code § 31-3506(e), to "engage in community health reinvestment to the maximum feasible extent consistent with financial soundness and efficiency," D.C. Code § 31-3505.01.

need not necessarily resolve this question under the circumstances. By raising the question of finality, the Court's Show Cause Order demonstrates a practical reason to hold the present petitions in abeyance pending the Commissioner's order addressing GHMSI's community reinvestment plan (which may spark further petitions for review).

A court possesses "general supervisory authority to manage [its] docket so as to 'promote[] the interests of justice,'" *Butler v. Dept. of Justice*, 492 F.3d 440, 445 (D.C. Cir. 2007) (quoting *In re McDonald*, 489 U.S. 180, 184 (1989)), and may hold a petition for review in abeyance if there is a non-jurisdictional question as to the case's justiciability. *See Wheaton College v. Sebelius*, 703 F.3d 551, 552–53 (D.C. Cir. 2012) (holding in abeyance petition for review challenged on ripeness grounds). Here, the Commissioner's Dec. 2014 Order is arguably final. *See supra*. But even if it is not final, it is not clear that the lack of finality affects this Court's jurisdiction. *Compare Warner v. District of Columbia Dept. of Employment Servs.*, 587 A.2d 1091, 1093 (D.C. 1991) *with Trudeau v. FTC*, 456 F.3d 178, 183–85 (D.C. Cir. 2006) (explaining that the federal APA's finality requirement is not jurisdictional because the statute is not "jurisdiction-conferring," but rather confers a cause of action); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006) ("Jurisdiction . . . is a word of many, too many, meanings." (quotation omitted)). *See also D.C. Appleseed*, 54 A.3d at 1200, 1216 (looking to decisions of the D.C. Circuit involving the federal APA in review of agency action under D.C. APA).

Both the arguable finality of the Dec. 2014 Order and the broader legal question of its impact on this Court's jurisdiction suggest that this Court may exercise its considerable discretion to hold the petitions in abeyance pending the Commissioner's resolution of GHMSI's community reinvestment plan, at which point the Court and parties would all agree that DISB's actions are final. Indeed, in light of the diverging interests raised by (1) the Commissioner's

ongoing consideration of GHMSI's community reinvestment plan, *see supra* pp. 4–5, 6, that might spark further petitions for this Court's review; and (2) the need for prompt appellate review in light of the significant delay in implementing the D.C. Council's 2009 enactment of MIEAA, *see supra* pp. 1–4,[3] this Court should hold the present petitions in abeyance pending the Commissioner's resolution of GHMSI's reinvestment plan.

Abeyance is supported by considerations of efficiency. For example, abeyance will allow all potential legal challenges relating to the Commissioner's review of GHMSI to be heard together, and also allow the present petitions to resume at the current stage rather than starting the entire appellate process—for both the Commissioner's Dec. 2014 Order and the Commissioner's future reinvestment plan order—over from scratch.[4] Moreover, because DISB is capable of filing now the administrative record relating to the substantively final Dec. 2014 Order, this Court might be able to expedite the briefing of these MIEAA cases by reducing the agency's time period, *see* D.C.C.A. Rule 17(a), to supplement the administrative record with the materials relating to GHMSI's reinvestment plan. That expedition will further the public interest in having MIEAA implemented after six years of delay.

CONCLUSION

For the foregoing reasons, the Court should hold D.C. Appleseed's and GHMSI's petitions for review in abeyance until the Commissioner issues an order resolving GHMSI's reinvestment plan.

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[3] This Court ordered, *sua sponte*, expedited review of D.C. Appleseed's prior appeal of the Commissioner's surplus determination under MIEAA.

[4] In addition, because GHMSI's reinvestment plan argues that the corporation has already spent its excessive surplus, GHMSI's petition—but not D.C. Appleseed's—may become moot if the Commissioner agrees with GHMSI.

Respectfully submitted,

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I certify that on this 6th day of April, 2015, I caused one copy of the foregoing to be sent by electronic mail to the following:

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