

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 20-OA-8

IN RE D.C. APPLESEED CENTER FOR
LAW AND JUSTICE, INC.,

Petitioner.

DC APPLESEED CENTER FOR LAW AND JUSTICE'S STATUS REPORT

DC Appleseed Center for Law and Justice (“Appleseed”) filed its petition on June 24, 2020 for issuance of a writ of mandamus to “compel agency action unlawfully withheld or unreasonably delayed,” D.C. Code § 2–510, by the D.C. Department of Insurance, Securities, and Banking (“DISB”) under the Medical Insurance Empowerment Amendment Act (“MIEAA”). *See* Appleseed Petition for Mandamus at 4, *In re D.C. Appleseed Ctr. for Law & Justice, Inc.*, No. 20-OA-8 (D.C. June 24, 2020). Appleseed’s petition concerned DISB’s failure to act for nearly a year since this Court had remanded this case for further proceedings before the agency.

On August 10, 2020, this Court issued an Order stating that “we share Appleseed’s concerns about DISB’s failure to take timely action on remand and DISB’s failure to adequately respond to Appleseed’s requests for action by DISB.” Order at 2, *In re D.C. Appleseed Ctr. for Law & Justice, Inc.*, No. 20-OA-8 (D.C. Aug. 10, 2020). The Court accordingly ordered the parties to submit a status report ninety days from the date of the Order. *Id.* Pursuant to the Court’s Order, Appleseed provides this report.

Appleseed is not aware of any action that the DISB Commissioner has taken since August 10, 2020 toward resolving the issues that this Court remanded to DISB. *DC Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep’t of Ins., Sec. & Banking (Appleseed II)*, 214 A.3d 978 (D.C.

2019). This is so even though on August 17, 2020, Appleseed sent a letter to the DISB Commissioner requesting (on page 4) that she issue a briefing schedule and “implement an expedited proceeding . . . on remand from the Court of Appeals.” Letter from Walter Smith, Exec. Dir., DC Appleseed Ctr. for Law & Justice, to Karima Woods, Commissioner, D.C. Dep’t of Ins., Sec. & Banking (Aug. 17, 2020). The Commissioner responded on August 25, stating that she was “committed to moving the review process forward in an expedited manner” and “look[ed] forward to providing an update in the coming weeks.” Nevertheless, as noted, Appleseed is aware of no action taken by DISB in response to this Court’s August 10 Order. The Court’s August 10 Order, Appleseed’s letter, and the Commissioner’s email response are submitted as attachments to this status update.

Respectfully submitted,



*Walter Smith
(D.C. Bar No. 238949)
D.C. Appleseed Center for Law & Justice, Inc.
1111 Fourteenth Street, NW,
Suite 510
Washington, D.C. 20005
Tel: (202) 289-8007
Fax: (202) 289-8009
wsmith@dcappleseed.org

Richard B. Herzog
(D.C. Bar No. 17731)
Harkins Cunningham LLP
1750 K Street, NW, Suite 300,
Washington, D.C. 20006
Tel: (202) 973-7602
Fax: (202) 973-7610
rbh@harkinscunningham.com

Marialuisa Gallozzi
(D.C. Bar No. 413874)
Beth Brinkmann
(D.C. Bar No. 477771)
Bradley K. Ervin
(D.C. Bar No. 982559)
Covington & Burling LLP
One CityCenter, 850 Tenth Street, NW
Washington, D.C. 20001
Tel: (202) 662-6000
Fax: (202) 662-6291
mgallozzi@cov.com

Counsel for Appleseed

CERTIFICATE OF SERVICE

I certify that on this 9th day of November, 2020, I caused one copy of the foregoing to be sent by electronic mail to the following:

Adam Levi, Assistant General Counsel
D.C. Department of Insurance and
Securities Regulation
810 First Street, NE, Suite 701
Washington, D.C. 20002
Phone: 202-442-7759
adam.levi@dc.gov

Loren AliKhan
James McKay
Office of the Solicitor General
Office of the Attorney General for the
District of Columbia
441 4th Street, N.W., Suite 630
Washington, D.C. 20001
loren.alikhan@dc.gov
james.mckay@dc.gov

Lisa Hertzler Schertler
SCHERTLER & ONORATO, LLP
1101 Pennsylvania Ave., N.W.
Suite 1150
Washington, D.C. 20004
lschertler@schertlerlaw.com


Michelle S. Kallen
Office of the Attorney General of Virginia
202 North Ninth Street
Richmond, VA 23219
mkallen@oag.state.va.us

I also caused one copy of the foregoing to be sent by U.S. mail to the following:

Virginia Bureau of Insurance
P.O. Box 1157
Richmond, Virginia 23218-1157

Maryland Office of the Attorney General
200 St. Paul Place
Baltimore, MD 21202

Maryland Insurance Administration
200 St. Paul Place, Suite 2700
Baltimore, MD 21202


Marialuisa Gallozzi

**District of Columbia
Court of Appeals**



No. 20-OA-8

IN RE: DC APPLESEED CENTER
FOR LAW & JUSTICE, INC.,
Petitioner.

BEFORE: Glickman and McLeese, Associate Judges, and Washington, Senior Judge.

O R D E R

Almost a year ago, this court issued an opinion remanding an administrative proceeding to respondent, the District of Columbia Department of Insurance, Securities and Banking (DISB). *DC Appleseed Ctr. for Law & Justice, Inc. v. DISB*, 214 A.3d 978 (D.C. 2019). In June of this year, D.C. Appleseed Center for Law and Justice, Inc., filed a petition for a writ of mandamus in this court, alleging that DISB had unreasonably failed to take any action in the proceeding since the remand. In support of the petition, Appleseed states that (1) the proceeding has been going on for years; (2) this court has already twice remanded the matter to DISB; (3) before the second remand, this court issued a writ of mandamus to DISB, concluding that DISB had unreasonably failed to act and directing DISB to issue a final decision with forty-five days, *In re DISB*, No. 17-OA-27 (D.C. Jan. 13, 2018); (4) after the most recent remand, Appleseed repeatedly asked DISB to resume the proceeding; and (5) DISB neither responded to those requests (except apparently to refer to one as “duly noted”) nor took any other action. Appleseed asks this court to require DISB to issue a final decision within forty-five days.

DISB and intervenor Group Hospitalization and Medical Services, Inc. (GHMSI), have filed oppositions to the petition. Those oppositions identify a single specific action taken by DISB in this proceeding since remand: a July 2020 letter from the then-Acting Commissioner of DISB to her counterparts in Maryland and Virginia, asking them to review a 2016 order by DISB in the case and get back to her. The letter was sent over ten months after this court’s most recent remand, and only after the current mandamus petition had been filed. The letter does not attempt to

No. 20-OA-8

establish any timeline for completing the proceeding on remand, instead asking only that each recipient let the Acting Commissioner “know at your earliest convenience when you may expect to complete your review,” at which point further discussion and consultations would occur on an unspecified schedule. DISB also states in its opposition that the Acting Commissioner “and the DISB staff have been devoting substantial time to addressing the Court’s decision in *Appleseed*.” Other than the letter, however, DISB does not identify any concrete actions that have been taken since remand.

DISB and GHMSI do attempt to explain DISB’s apparent lack of progress. Specifically, they state that (1) a new Acting Commissioner was appointed several months after remand; (2) the COVID-19 pandemic has created complications and has imposed substantial responsibilities on DISB; (3) DISB’s task on remand is complex, and (4) it therefore would be unreasonable to require DISB to enter a final order within forty-five days.

We are sympathetic to some of the points made by DISB and GHMSI in their oppositions. On the other hand, we share Appleseed’s concerns about DISB’s failure to take timely action on remand and DISB’s failure to adequately respond to Appleseed’s requests for action by DISB. It is therefore

ORDERED that the petition for a writ of mandamus is held in abeyance for a period of ninety days, at which point the parties shall file status reports with the court.

PER CURIAM

Copies e-served to:

Lisa Schertler, Esquire

Marialuisa Gallozzi, Esquire

Loren L. AliKhan, Esquire
Solicitor General, D.C.

cml



By electronic mail

August 17, 2020

Karima Woods
Commissioner
Department of Insurance, Securities, and Banking
1050 First Street, NE 801
Washington, D.C. 20002

Re: GHMSI Surplus Review

Dear Commissioner:

We write to follow up on the order issued last week by the District of Columbia Court of Appeals in the mandamus action we filed on June 24 to expedite the remand proceedings following the Court's August 29, 2019 decision in *D.C. Appleseed Ctr. for Law & Justice, Inc. v. D.C. Dep't of Ins., Sec. & Banking*, 214 A.3d 978 (D.C. 2019). This letter includes our proposed schedule and requests a response to that proposal.

More than a decade has passed since the underlying statute, the Medical Insurance Empowerment Amendment Act ("MIEAA") directed the Commissioner to review GHMSI's year-end 2008 surplus¹; this years-long delay in enforcement of the statute is the backdrop for this proceeding. Nearly an additional full year has now elapsed since the Court's remand order in August 2019, without any action by the Commission on that Court order, notwithstanding our repeated requests for prompt action, adding further unreasonable delay in enforcing the law.

The Court's *sua sponte* order requiring a status report from the parties in 90 days reflects the urgency of this matter. As the Court wrote: "we share Appleseed's concerns about DISB's failure to take timely action on remand and DISB's failure to adequately respond to Appleseed's requests for action by DISB." *In re: DC Appleseed Ctr. for Law & Justice, Inc.*, No. 20-OA-8, Order at 2 (D.C. Aug. 10, 2020). The Court observed that DISB had done nothing in the year since the Court's August 2019 remand other than send one letter to Commissioner Kathleen A. Birrane of Maryland and

¹ The original surplus review under MIEAA concerned GHMSI's surplus as of year-end 2008. The proceedings were so long delayed that the then-Commissioner undertook a review of the 2011 year-end surplus rather than of the 2008 surplus that was the original focus of the District of Columbia Council when enacting the statute.

Commissioner Scott A. White of Virginia with a nonspecific request for input and without a deadline. And DISB did so only after Appleseed filed the mandamus action. We submit that a similar effort will not satisfy the Court when it reviews this matter again. Accordingly, Appleseed renews its prior proposal to establish an expedited schedule and start the remand proceeding promptly. Implementation of such a schedule will be needed to report appropriate progress when the parties file status reports within 90 days as the Court directed.

Proposed Schedule for Remand Proceedings and Request for Response

Nearly three months after the August 29, 2019 remand, Appleseed submitted a proposed schedule to the Commission for the remand proceedings. When DISB did not respond, Appleseed renewed its request in a letter dated January 10, 2020. When DISB again did not respond, Appleseed filed a motion to expedite briefing and also filed its opening brief on May 14, 2020, despite the absence of scheduling guidance from DISB. After Appleseed filed the mandamus action in the Court on June 24, 2020, DISB subsequently requested input from the Maryland and Virginia Commissioners by letter dated July 10, 2020. There is no information in the record as to whether and how the three Commissioners have discussed DISB's remand proceedings.

To facilitate the Commissioner's work, Appleseed's May 14, 2020 brief filed with DISB proposed a more detailed remand schedule based on Appleseed's November 18, 2019 proposal. It read as follows:

- "The Commissioner should immediately order GHMSI to spend down the \$51 million of excess surplus.
- The Commissioner should permit GHMSI to respond to Appleseed's Motion and accompanying brief no later than 20 days after the filing of this Motion and brief.
- The Commissioner should invite the Virginia and Maryland state insurance regulators and permit any other interested party to submit a pre-hearing public statement to DISB no later than 14 days after filing of this Motion and brief or GHMSI's response, whichever is later. Any pre-hearing public statement should be limited to 20 pages.
- If GHMSI and/or Virginia and Maryland insurance regulators submit a response to Appleseed's Motion and brief, the Commissioner should permit Appleseed to file a reply, no later than 14 days after the filing of the response.
- At the close of the parties' opportunity to respond to this Motion and the accompanying brief and Appleseed's opportunity to submit a reply, the Commissioner, in consultation with Virginia and Maryland state insurance regulators on the public record, should issue a notice

for a joint public hearing (by teleconference, if need be) regarding the issues that remain to be addressed on remand in light of the Court of Appeals' decision and the existing factual record. The Commissioner should schedule the joint public hearing to be no more than 14 days after the close of the parties' opportunity to respond to this Motion and Appleseed's opportunity to submit a reply.

- The Commissioner should jointly preside over the public hearing with the relevant Virginia and Maryland state insurance regulators, during which any interested party may make a public statement and respond to regulator questions, and address the positions expressed in any pre-hearing submissions.
- Appleseed, GHMSI, the Virginia and Maryland state insurance regulators, and any other interested party should be afforded the opportunity to submit a responsive public statement no later than 14 days after the joint hearing. Any post-hearing public statement may include the party's proposed findings and conclusions regarding the remand issues and their effect on GHMSI's permissible year-end 2011 surplus, and should be limited to 30 pages.
- The Commissioner should issue a final decision on remand within 30 days after receiving any post-hearing statements."

There is no reasonable justification for any further delay in this proceeding. Over the past decade, the parties have had full and fair opportunities to make their respective arguments and develop the requisite factual record on GHMSI's year-end 2011 surplus. That existing factual record is the basis of the remand proceedings and the Commissioner's determination on remand. Moreover, Appleseed provided its opening brief to DISB, GHMSI and the Commissioners of Maryland and Virginia on May 14, 2020. They have now had three months to formulate their responsive arguments. In addition, in light of the Commissioner's July 10 letter to the other Commissioners, they have now had over a month to formulate their views on the remand issues.

We ask that you respond to this proposal on or before Friday August 21, 2020.

Complying with the Coordination and On-the-Record Requirements

The Court provided guidance in its remand order on the appropriate procedure as well as on the discrete substantive issues to be addressed in the remand proceeding.

The Court directed the Commissioner to address the following discrete issues in coordination with the Commissioners of Maryland and Virginia: (1) the Commissioner's potentially erroneous calculation of the effect of GHMSI's projected equity-portfolio gains and losses on GHMSI's permissible surplus, (2) attribution of GHMSI's excess surplus to the District of Columbia, (3)

Appleseed's requests for reimbursement of actuarial fees and for prejudgment interest, and (4) the appropriate means for reinvesting GHMSI's excess surplus in community health in the District.

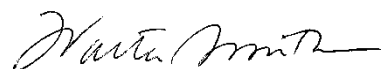
The Court also provided guidance with respect to the appropriate procedure for DISB to follow in the proceedings on remand.

First, the Court of Appeals explained that MIEAA's coordination requirement may include, but is not limited to, the Commissioner, on the public record, (1) inviting the insurance regulators of Virginia and Maryland to participate in a joint proceeding assessing GHMSI's surplus, (2) soliciting their on-record input, (3) considering the interest in uniform regulation of GHMSI, and (4) explaining the Commissioner's decisions that conflict with the input of Virginia and Maryland. *D.C. Appleseed*, 214 A.3d at 989. At the same time, although "mere consultation" is insufficient to satisfy MIEAA's coordination requirement, the Court made clear that MIEAA does not require unanimous agreement among the different regulators, *see id.* at 988–89, and neither Maryland nor Virginia may compel the outcome of a District agency procedure created by a District statute. Under GHMSI's congressional charter and the MIEAA, the Commissioner is the domiciliary regulator and retains ultimate decision making authority over GHMSI's year-end 2011 surplus.

Second, the Court reminded the parties that input into the DISB Commissioner's decision must be "on the record." In that context, Appleseed notes that the Commissioner's July 10 letter to Commissioners Birrane and White referred to a discussion among the regulators on July 9. We trust that discussions involving the GHMSI surplus, including the input from other commissioners, are fully reflected in the agency's record. *See, e.g., Richard Milburn Pub. Charter Alternative High Sch. v. Cafritz*, 798 A.2d 531, 538 & n.7 (D.C. 2002) (explaining that, in conducting proceedings in a "contested case," "the agency is required to maintain an official record"); D.C. Code § 1-1509(c). Going forward, Appleseed requests a transcription of discussions or proceedings undertaken pursuant to MIEAA and the Court's remand order.

For the foregoing reasons, Appleseed respectfully requests that the Commissioner implement an expedited proceeding, as set forth above, on remand from the Court of Appeals.

Respectfully submitted,



Walter Smith, Executive Director
DC Appleseed Center for Law and Justice

Commissioner Karima Woods
November 9, 2020
Page 5

cc: Adam Levi, Assistant General Counsel
D.C. Department of Insurance and Securities Regulation

Loren AliKhan
James McKay
Office of the Solicitor General

Lisa Hertzner Schertler
Schertler & Onorato, LLP

Michelle S. Kallen
Office of the Attorney General of Virginia

From: Walter Smith
Sent: Tuesday, August 25, 2020 4:08 PM
To: Woods, Karima (DISB) <karima.woods@dc.gov>
Subject: RE: GHMSI Surplus Proceedings

Commissioner Woods: thanks very much for responding to our letter. We look forward to working with you on this urgent case.

Walter Smith
Executive Director

DC Appleseed Center for Law and Justice
1111 14th Street NW, Suite 510 | Washington, DC 20005
P: (202) 289-8007 Ext: 17 | F: (202) 289-8009
wsmith@dcappleseed.org | www.dcappleseed.org
Follow us on Twitter [@DC_Appleseed](https://twitter.com/DC_Appleseed)

From: Woods, Karima (DISB) <karima.woods@dc.gov>
Sent: Tuesday, August 25, 2020 2:59 PM
To: Walter Smith <wsmith@dcappleseed.org>
Subject: RE: GHMSI Surplus Proceedings

Director Smith,

Thank you for submitting your August 17, 2020 letter. I appreciate your sense of urgency regarding the GHMSI Surplus Review and am committed to moving the review process forward in an expeditious manner. I look forward to providing an update in the coming weeks.

Sincerely,

Karima Woods
Commissioner
Department of Insurance, Securities, and Banking
1050 First Street., NE, Suite 801
Washington, D.C. 20002
karima.woods@dc.gov
O: (202) 442-7845
M: (202) 412-6596

From: Walter Smith <wsmith@dcappleseed.org>
Sent: Monday, August 17, 2020 12:14 PM
To: Woods, Karima (DISB) <karima.woods@dc.gov>
Subject: GHMSI Surplus Proceedings

CAUTION: This email originated from outside of the DC Government. Do not click on links or open attachments unless you recognize the sender and know that the content is safe. If you believe that this email is suspicious, please forward to phishing@dc.gov for additional analysis by OCTO Security Operations Center (SOC).

Dear Commissioner Woods: in the wake of the D.C. Court of Appeals' recent order concerning your review of GHMSI's surplus, I am submitting DC Appleseed's proposal to you concerning appropriate next steps for resolving this longstanding matter. Many thanks for considering the proposal.

Walter Smith
Executive Director

DC Appleseed Center for Law and Justice
1111 14th Street NW, Suite 510 | Washington, DC 20005
P: (202) 289-8007 Ext: 17 | F: (202) 289-8009
wsmith@dcappleseed.org | www.dcappleseed.org
Follow us on Twitter [@DC_Appleseed](https://twitter.com/DC_Appleseed)

For the latest information on the District Government's response to COVID-19 (Coronavirus), please visit coronavirus.dc.gov.