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.	)	Order No.: 14-MIE-004

ORDER ON DC APPLESEED PARTICIPATION

The D.C. Appleseed Center for Law and Justice, Inc. ("DC Appleseed") has filed motions requesting that the Commissioner of the District of Columbia Department of Insurance, Securities and Banking (the "Commissioner") take the following actions: (1) allow DC Appleseed to intervene as a party in this proceeding, (2) modify the Second Scheduling Order of May 19, 2014 (the "Second Scheduling Order") by increasing the page limit applicable to DC Appleseed's pre-hearing written report, and (3) grant DC Appleseed the right to make a closing statement at the hearing scheduled for June 25, 2014 ("DC Appleseed Motions").

Group Hospitalization and Medical Services, Inc. ("GHMSI") has filed a response to the DC Appleseed Motions requesting that if DC Appleseed is allowed to make a closing statement at the hearing, GHMSI be permitted to make the *final* closing statement.

In an Order Modifying Second Scheduling Order issued June 6, 2014, the Commissioner granted DC Appleseed's motion to increase the page limit applicable to its pre-hearing report.

The Commissioner now considers DC Appleseed's two other motions and GHMSI's request to make the final closing statement at the hearing.

Applicable Law

This proceeding concerns the review of GHMSI's surplus to determine whether it is excessive under Section 7 of the Hospital and Medical Services Corporation Regulatory Act of 1996, effective April 9, 1997 (D.C. Law 11-245; D.C. Official Code § 31- 3506 (2012 Repl.)), as amended by the Medical Insurance Empowerment Amendment Act of 2008, effective March 25, 2009 (D.C. Law 17-369; D.C. Official Code §§ 31-3501 *et seq.* (2012 Repl.)) (collectively, the "MIEAA"). The procedure for conducting a surplus review under the MIEAA is governed by regulations promulgated by the District of Columbia Department of Insurance, Securities and Banking ("DISB") at 26A DCMR § 4600 *et seq.* (the "MIEAA Regulations").

In accordance with D.C. Official Code § 31-3506(e)(2) (2012 Repl.) and 26A DCMR § 4601.5, the Commissioner has scheduled a public hearing in connection with the review of GHMSI's surplus.

The District of Columbia Court of Appeals has ruled that a surplus review under the MIEAA is a "contested case" within the meaning of the District of Columbia Administrative Procedure Act, D.C. Official Code § 2-501 *et seq.* (2012 Repl.) ("DC APA"). *D.C. Appleseed Center for Law and Justice, Inc. v. District of Columbia DISB*, 54 A.3d 1188, 1199 (D.C. App. 2012) (hereinafter "*DC Appleseed Appeal*"). Thus, the hearing in this proceeding also is subject to the DC APA and DISB's rules governing contested case hearings at 26A DCMR § 3800 *et seq.* (the "DISB Rules of Practice and Procedure for Hearings"), which were promulgated under the DC APA.

Accordingly, there are two sets of authorities in evaluating the present motions by DC Appleseed and GHMSI: (1) the MIEAA and the MIEAA Regulations and (2) the DC APA and DISB Rules of Practice and Procedure for Hearings.

The MIEAA and MIEAA Regulations

The MIEAA and the MIEAA Regulations do not define who is a "party" for purposes of a surplus review proceeding. The MIEAA Regulations, however, very specifically establish the rights and obligations of the hospital and medical service corporation whose surplus is the subject of the review (here, GHMSI) and the rights of interested members of the public in connection with the review. Nothing in the MIEAA or the MIEAA Regulations suggests that any person should be granted procedural rights beyond those specifically set forth in the MIEAA Regulations.

The MIEAA Regulations grant substantial rights of participation to interested members of the public. Under the MIEAA Regulations, interested members of the public may submit a written report for consideration by the Commissioner prior to the surplus review hearing, make an oral presentation at the hearing at the discretion of the Commissioner, and file a rebuttal statement clarifying any issue or responding to questions raised at the hearing. 26A DCMR §§ 4602.2, 4602.3(c), 4602.4.

These rights and, as discussed below, certain additional enhanced procedural rights granted to DC Appleseed by this Order will allow DC Appleseed to participate effectively in this proceeding in accordance with its role as a nonprofit advocacy organization with a special interest in the implementation of MIEAA. Indeed, as the Court of Appeals noted, DC Appleseed "fully participated as an 'interested member of the public'" in DISB's 2009 review of GHMSI's surplus, which involved exercising the rights granted to interested members of the public under the MIEAA Regulation. *DC Appleseed Appeal* , 54 A.3d at 1208 and n. 27.

The DC APA and DISB's Rules of Practice and Procedure for Hearings

Under the DC 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. Official Code § 2-502(10) (2012 Repl.). Similarly, under DISB Rules of Practice and Procedure for Hearings, a "party" is "any person or agency named or admitted as a party, in any proceeding before the Commissioner. . . ." 26A DCMR § 3819.

As discussed above, nothing in the MIEAA or the MIEAA Regulations suggests that DC Appleseed is entitled as of right to intervene as a party in the GHMSI surplus review proceeding. Rather, the MIEAA Regulations specifically define the procedural rights of interested members of the public with respect to such proceedings.

Moreover, it is clear that DC Appleseed is not a party in this proceeding when one considers the definition of the term "party" in the context of what it means for an administrative proceeding to constitute a contested case. 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. Official Code § 2-502(8) (2012 Repl.). In this proceeding, no legal rights, duties, or privileges specific to DC Appleseed will be determined by the Commissioner.

DC Appleseed argues that it is entitled to intervene as a party in this proceeding because the Court of Appeals granted it standing to obtain judicial review of DISB's 2009 determination regarding GHMSI's surplus. In support of this proposition, it quotes from a concurring opinion in a D.C. Circuit Court of Appeals case, *Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601 (D.C. Cir. 1978) (hereinafter "*Koniag*"), stating: "[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." *Id.* at 613 (Bazelon, J., concurring). Appleseed's argument thus equates judicial standing with party status.

DC Appleseed's argument is not persuasive. Its cited authority is no more than dicta, as it is entirely tangential to the main analysis of the concurring opinion. *See id.* (analyzing separate question of whether judicial standing doctrines should be imposed upon administrative proceedings). It also is dicta since it is not part of the majority opinion, but rather appears in a concurrence. *See, e.g.*, *Maryland v. Wilson*, 519 U.S. 408, 412 (1997) ("We agree with respondent that the former statement was dictum, and the latter was contained in a concurrence, so that neither constitutes binding precedent."). Moreover, *Koniag* was decided in 1978. More recently, the D.C. Circuit Court has declined to follow the dicta stated in Judge Bazelon's concurring opinion. *See Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n*, 194 F.3d 72, 75-76 (D.C. Cir. 1999) (whether agency must permit petitioner to intervene in an administrative proceeding "turns not on judicial decisions dealing with standing to sue, but on familiar principles of administrative law regarding an agency's interpretation of the statutes it alone administers").

Even assuming that *Koniag's* dicta was binding, at most this means DC Appleseed should have some right to participate in the surplus review proceeding to assure proper development of the record, not that DC Appleseed should be granted leave to intervene as a party. As detailed below, DC Appleseed will indeed be given enhanced rights of participation in the review of GHMSI's surplus.

DC Appleseed's Enhanced Rights of Participation

In view of DC Appleseed's longstanding involvement with and special interest in the MIEAA, it is appropriate to provide it with reasonable additional and enhanced rights of participation in this proceeding, which the Commissioner may do according to his discretionary authority under 26A DCMR § 4602.3(c) (discretion to allow interested members of the public to make oral presentations at a surplus review hearing) and 26A DCMR § 3800.2 (discretion to modify any of the DISB Rules of Practice and Procedure for Hearings for good cause shown or to promote the interests of justice).

DISB already has provided substantial enhanced rights of participation in this proceeding to DC Appleseed. As DC Appleseed itself notes in its motion, it has had "extensive engagement with DISB, its consultants, and GHMSI in preparation for the upcoming surplus review hearing." DC Appleseed Motions at 4. This engagement has included four lengthy sets of questions and data requests from DC Appleseed, each followed by detailed written responses from DISB and its expert consultants, as well as several conference calls among DC Appleseed, DISB staff and consultants, and GHMSI to clarify and discuss DC Appleseed's questions and data requests. In addition, by his Order Modifying Second Scheduling Order, issued on June 6, 2014, the Commissioner granted DC Appleseed the right to submit a written report to DISB of up to 50 pages in length, excluding attachments, which greatly exceeds the 15-page limit for such reports established by 26A DCMR § 4602.2. Furthermore, under the Second Scheduling Order, DC Appleseed and other interested members of the public have been invited to propose questions to be directed to the anticipated principal witnesses at the surplus review hearing.

In addition to these enhanced rights, it is appropriate for DC Appleseed to be permitted to make an oral presentation at the hearing and, as requested, make a closing statement. GHMSI,

however, will be permitted to make the *final* closing statement at the hearing. This is appropriate because GHMSI is the regulated entity whose surplus is at issue in this proceeding and because the MIEAA Regulations expressly provide that GHMSI "should be allowed to make a final statement prior to the conclusion of the hearing." 26A DCMR § 4602.3(e). As provided by the MIEAA Regulations, GHMSI's closing statement may not exceed 30 minutes in length.

Accordingly, the Commissioner hereby ORDERS as follows:

(1) DC Appleseed's motion to intervene as a party in the captioned proceeding is DENIED.

(2) DC Appleseed shall be permitted to make an oral presentation at the hearing scheduled for June 25, 2014, of up to sixty (60) minutes in length.

(3) DC Appleseed's motion to make a closing statement at the hearing is GRANTED, and DC Appleseed shall be permitted to make a closing statement of up to thirty (30) minutes in length prior to GHMSI's closing statement.

(4) GHMSI's request to make the final closing statement at the hearing is GRANTED. In accordance with 26A DCMR § 4602.3(e), GHMSI's closing statement may not exceed thirty (30) minutes in length.

Dated: June 10, 2014

Chester A. McPherson, Acting Commissioner

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