

**BEFORE THE INSURANCE COMMISSIONER  
FOR THE STATE OF DELAWARE**

**In Re: The Proposed Affiliation of                    )**  
**BCBSD, INC., doing business as                    )**           **Docket No. 1509-10**  
**Blue Cross Blue Shield of Delaware,            )**  
**with Highmark Inc.                                    )**

**ORDER ON APPLICATION OF JO ANN FIELDS M.D.  
FOR PARTY STATUS**

This is memorialize the decision of the Hearing Officer, made orally at the hearing held on January 18, 2011, with respect to the application of Jo Ann Fields, M.D. to be determined a party in interest to the above captioned matter.

In her Pre-Hearing Order of October 20, 2010 (entered prior to the appointment of the Hearing Officer) the Insurance Commissioner of the State of Delaware, the Honorable Karen Weldin Stewart (“Commissioner”) identified the following “parties in interest” to the proceeding: the Department of Insurance (“Department”), Blue Cross Blue Shield of Delaware (“BCBSD”) and HIGHMARK INC. (“Highmark”). Her order also directs that, by agreement of the parties, the Attorney General of the State of Delaware, representing the State in his capacity as *parens patriae*, is a party.

The Commissioner’s Pre-Hearing Order (“Order”) recognized the possibility of additional “parties in interest” to the proceeding and sets out the following standards for the admission of such parties:

Any additional Parties shall be admitted by application to the Hearing Officer upon a hearing, at which the present Parties may be heard and approval by separate order based upon a showing that such person has a significant pecuniary interest in the proceeding, which interest is not adequately represented by an existing Party, and the

protection of which otherwise will be impaired or impeded unless such person is admitted as a Party.

(Order, paragraph 4)

The Order directed the Department to publish notice of the opportunity to seek party status. Notice was published in The News Journal, Wilmington, DE., and the Delaware State News, Dover, DE on December 3 – 7, 2010. (Exhibits 1, 2 and 3)

In response to this Notice, three applications were received:

The first, dated December 13, 2010 was from Gary M. Ciaffi, CPA, Senior Vice President of Delle Donne & Associates, Inc., on behalf of Corporate Plaza SPE, LLC, as landlord to BCBSD. On January 12, 2011 the Hearing Officer was advised by the Department of Insurance that Mr. Ciaffi would not be pursuing his application. (Exhibits 5, 6 & 7)

The second, dated December 21, 2010, was from the Honorable Michael S. Katz, State Senator, 4<sup>th</sup> District, who advised the Department by electronic mail that he wished to become a party. Subsequently he requested the Commissioner to retract his application. The request was forwarded to the Hearing Officer who, on January 11, 2011, accepted the retraction. (Exhibits 8, 9, 10, 11)

The final application, dated December 28, 2010, was from Jo Ann Fields, M.D. of Felton, DE. (Exhibit 4) Dr. Fields' application states that "as a customer of BCBSD I have a financial stake" in the proposed affiliation. She also asserts that, as she purchases health insurance from BCBSD in the individual and small group market, she is "particularly vulnerable to above average rate increases." Her application expresses concern about the process by which rates are reviewed. BCBSD, Highmark and the Department filed responses opposing her application. The Attorney General took no

position on the application. Dr. Fields filed a further document in connection with these responses, entitled a "response to objections from BCBSD and the Department" and "statement for the public hearing". (Exhibit 12)

As provided in the published Notice, a hearing was held on January 18, 2011. Dr. Fields was present for the hearing, as were Counsel for Highmark, BCBSD, the Department, and the Attorney General and the Hearing Officer and her counsel. Representatives of the Department also attended the hearing. The Hearing Officer heard the statement of Dr. Fields.

At the conclusion of the hearing, the Hearing Officer denied the request of Jo Ann Fields, M.D., to be a party in interest to the proceeding. However, the Hearing Officer explained to Dr. Fields that, as stated in the published Notice, she was welcome to attend the hearing on the proposed affiliation, which will be open to the public; to offer oral and written comment on the merits of the proposal; and, subject to certain restrictions, to review the record in the matter.

#### DISCUSSION

The admission of additional parties to this affiliation proceeding is governed primarily by the Commissioner's Order. However, the provisions of 18 *Del.C.* § 5003 are also relevant. The parties have agreed that the affiliation request will be reviewed according to the factors set out in 18 *Del.C.* §5003(d)(1), which requires a public hearing. Public hearings are in turn governed by 18 *Del.C.* §5003(d)(2), which, among other provisions, deals with the admission of additional "parties in interest". Subsection (d)(2) specifies that the status of "party in interest" confers on a successful applicant the opportunity to present evidence at the hearing on the proposed affiliation, examine and

cross-examine witnesses, offer oral and written arguments, and, subject to certain deadlines, conduct discovery.

It is important to note at the outset of this discussion, however, that persons who are denied party status nevertheless have opportunity to participate in the present proceedings in a meaningful way. Both the Order and the provisions of 18 *Del.C.* § 5003(d)(1) require a public hearing. And, as the Commissioner's Order makes clear, "(a)ny person, whether or not a Party, may appear at the hearing and present testimony in aid of the inquiry. . . ." (Order, paragraph 5) Such persons may also furnish written statements and their submissions will be part of the record in the matter and considered by the Hearing Officer and by the Commissioner. They are also entitled to review the entire public record in the matter, including the exhibits and information submitted by the parties, except for information which the hearing officer determines is confidential.

The Code provision dealing with a determination of whether an applicant shall be a "party in interest" refers to "person whose interest may be affected" by the proceeding. 18 *Del.C.* § 5003(d)(2). It does not define the nature or extent of that "interest". Paragraph 4 of the Commissioner's Order offers guidance, however, by specifying that in order to become a party to this proceeding an applicant must meet three specific requirements. These are: 1) the applicant must have a "significant pecuniary interest" in the proceeding; 2) the interest is not adequately represented by an existing Party to the proceeding; and 3) protection of the interest will be impaired or impeded unless such person is admitted as a party. (Order, paragraph 4) To a significant extent, the Commissioner's order tracks the provisions Rule 24 of the Civil Rules of the Delaware Superior Court which governs the intervention of new parties in proceedings in that Court. Under Rule 24, an applicant for party status must demonstrate not only an interest

in the matter before the Court, but must show that the ultimate disposition of the matter “may as a practical matter impair or impeded the applicant’s ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.”

The interest which Dr. Fields asserts is that she is a “customer”, or policyholder, of BCBSD and that she has been, and may in the future be, affected by “above average rate increases”. She states that her health insurance rate recently increased by 13%. Although the Commissioner’s order directs that the interest asserted must be a “significant pecuniary interest”, such an interest is not determined simply by considering the amount of the financial impact on the applicant. This is made clear by the decision of the hearing officer in another case before the Delaware Insurance Department, *In The Matter Of: The Proposed Acquisition of Royal Indemnity Company, et al. by Arrowpoint Capital Company, et al.*, Docket No., 313, (Del. Ins. Dept., Dec. 20, 2006). In that matter, the hearing officer denied party status to applicants who held insurance policies that involved “upwards of hundreds of millions of dollars”. The hearing officer determined that, rather than simply accepting a demonstration of a large financial interest, “some distinct, substantial interest beyond that as a policyholder should be required as a basis for entitlement to party status in proceedings under § 5003.” The idea that the interest asserted must be more than that of a policyholder is also suggested by a very practical concern in an administrative hearing of this nature: the Commissioner would be overwhelmed if every policyholder were entitled to party status. Accordingly, some distinct and substantial interest beyond that of policyholder must be demonstrated by an applicant for party status.

Dr. Fields cites no interest beyond her status as a policyholder who might be affected by an increase in rates.

Further, Dr. Fields has also failed to demonstrate that her interest cannot be adequately protected by the existing parties to the affiliation proceeding, as is required under the Commissioner's Order. Both the Department and the Attorney General are parties to the affiliation proceeding and both have responsibilities to the BCBSD policyholders to make sure their interests are not harmed by the proposed affiliation. In the Hearing Officer's decision in the *Royal Indemnity* matter, *supra.*, the hearing officer stated that "All agree that the protection of policyholders is the paramount objective of Delaware's body of insurance regulation." And, in an earlier manifestation of the present matter, the Delaware Superior Court noted that "[i]n Delaware, as in most states, the Insurance Commissioner is charged with the responsibility of providing scrutiny and assessing risk to Delaware policyholders by enforcing the laws and regulations with their best interests in mind." *In re BCBSD, Inc.* 2004 WL 2419161 at \*13 (Del. Super. Ct.)

Dr. Fields' application states that when she complained to the Department about her rate increase in July 2010, she was told that the information pertaining to insurance rates is private and not subject to a Freedom of Information Act request. Although the matter of insurance rates may well have some pertinence to the affiliation inquiry because it may affect the interest of BCBSD policyholders, it is not the central inquiry in this matter. This matter deals with the proposed affiliation of two insurers. The Order directs that in this matter, ". . .the Hearing Officer shall apply the specific criteria for approving or disapproving a change of control of a Delaware domestic insurer found at 18 *Del. C.* §5003(d)(1). . . ." While those criteria include consideration of "the interest of policyholders of the insurer" and the "public interest" which, as noted, touches on the matter of rates, the approval by the Commissioner of insurance rates is a distinct matter governed by a number of other provisions of the Delaware Insurance Code.

Dr. Fields' primary concern is with the current process in Delaware by which insurance rates are reviewed and approved. She did not demonstrate that the Department failed to follow Delaware law in approving the earlier rate increase to which she objects or responded to her earlier inquiries in an inappropriate manner. Nor has she demonstrated any other factors to suggest that, in the present proceeding, the Department cannot adequately represent her interest as a policyholder.

In addition to the Department of Insurance, the Attorney General is also participating as a party in this proceeding. The Attorney General's role in the proceeding is that of *parents patriae*, in which capacity he is charged with looking out for the welfare of the people of the state. In a media release relating to the proposed affiliation, the Attorney General describes his role as follows:

. . . (T)he Attorney General's office has a responsibility to be a voice for Delawareans and represent the best interests of the public. The proposed BCBS/Highmark transaction raises a number of serious questions regarding the quality of care to its beneficiaries, the cost of care to its beneficiaries, and the disposition of this non[sic]-for-profit's significant cash reserve. We will ensure that all the necessary questions are asked and answered before this transaction proceeds.

*See* Media Release, Department of Justice, January 4, 2011.

This strong statement certainly suggests that Dr. Fields' interest, as well as the interests of all policyholders, will be adequately pursued by the Attorney General as a party to the affiliation proceeding.

Finally, the Parties have agreed that the affiliation will be governed by the provisions of 18 *Del. C.* § 5003(d)(1) which sets out certain factors which the Commissioner must consider in connection with the proposed affiliation. Several of these factors require the Commissioner specifically to consider the "interest of its

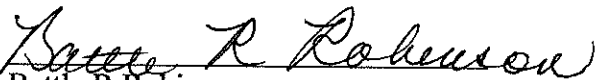
policyholders”, the “public interest” and “the interest of policyholders of the insurer and of the public. . . .” 18 *Del.C.* §5003(d)(1)(c)(d) and (e).

The role of the Department in this matter, the involvement of the Attorney General in the role of *parens patriae*, as well as the statutory factors which must be considered in reviewing the proposed affiliation, all establish that Dr. Fields’ interest as a policyholder will be adequately protected.

#### CONCLUSION

For the foregoing reasons, the application of Jo Ann Fields M.D. to be a party in interest in the proceedings is DENIED.

Even though Dr. Fields is not entitled to participate in the proceedings as a party in interest, as noted earlier this does not mean she is not able to participate in a meaningful way. She and other Delawareans who have concerns or questions about the proposed affiliation have opportunity to attend the hearing and to offer comments and suggestions, either orally or in writing, which will be considered by the Hearing Officer and the Commissioner.

  
Battle R Robinson  
Hearing Officer

January 25, 2011