

STATE OF NORTH CAROLINA
DURHAM COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 INS 738

BLUE CROSS AND BLUE SHIELD)
OF NORTH CAROLINA,)
)
Petitioner,)
)
v.)
)
NORTH CAROLINA STATE)
HEALTH PLAN FOR)
TEACHERS AND STATE)
EMPLOYEES)
)
Respondent)
)
and)
)
AETNA LIFE INSURANCE)
COMPANY)
)
Respondent-Intervenor.)

AMENDED MOTION TO DISQUALIFY

NOW COMES Respondent the North Carolina State Health Plan for Teachers and State Employees (“Respondent” or “SHP”), by and through the undersigned counsel, and pursuant to Rule 1.9 of the North Carolina Revised Rules of Professional Conduct, hereby respectfully submits this Amended Motion to Disqualify the firm of Robinson, Bradshaw & Hinson, P.A. (“RBH”)¹ as counsel for Petitioner Blue Cross and Blue Shield of North Carolina (“Petitioner” or “BCBS”). This Amended Motion supersedes the original Motion

¹ Notwithstanding any prior query or discussion related to counsel Matt Sawchak’s representation of BCBS in this contested case, Respondent does not move to disqualify him in his individual capacity separate and apart from RBH.

to Disqualify and accordingly no response by Petitioner to that original Motion is needed.

In support of this Amended Motion, the SHP shows the following:

Petitioner's Action

1. Petitioner, represented by RBH, has initiated this contested case challenging the decision to award Aetna Life Insurance Company (“Aetna”) the SHP’s 2025–2027 contract for third-party administrator (“TPA”) services. (Pet. intro ¶¶, p. 1).

2. Specifically, Petitioner alleges the SHP’s application of criteria, gathering and consideration of information, and scoring system was erroneous, arbitrary, and capricious. (Pet. intro ¶¶, p. 1).

3. Petitioner’s allegations are drafted as claims that erroneous actions were taken solely by the SHP as a legal entity that is distinct and separate from the North Carolina State Treasurer Dale R. Folwell, CPA (“Mr. Folwell” or “Treasurer”) and the North Carolina Department of State Treasurer (“Department”).

4. The SHP, however, is not a separate and distinct legal entity for purposes of determining whether a conflict of interest exists for RBH. Rather, the SHP is both under the supervision of the Treasurer and the Department while being part thereof. Petitioner’s allegations of erroneous, arbitrary, and capricious actions effectively challenge the actions and decisions of the Treasurer and the Department.

5. RBH cannot avoid this conflict of interest simply by omitting reference to the Department and Treasurer in the Petition, thereby suggesting that a distinction exists between the Department it now challenges and the same Department it elsewhere represented.

6. As detailed below, in a series of letters² and telephone calls between January 20, 2023, and March 10, 2023, representatives of the Department and RBH discussed whether RBH's representation of BCBS created a conflict under the North Carolina Rules of Professional Conduct. The representatives were unable to resolve the issue.

7. In a letter dated May 1, 2023, sent by the managing partner of RBH to representatives of the SHP after the original Motion to Disqualify was filed, RBH notified the Department that the RBH attorney who was handling the investment matter was leaving RBH, effective immediately.

8. At the time of the filing of the original Motion to Disqualify, that attorney and RBH were engaged by the Department to assist with reviewing and revising the transaction documents for an investment on behalf of the North Carolina Retirement Systems ("NCRS"). (See Affidavit of Samuel W. Watts in support of this Amended Motion to Disqualify, attached hereto as Exhibit A ¶¶ 33-35; N.C. Gen. Stat. § 147-69.2(b)(8)). The Department now will not be completing this transaction with RBH's assistance.

Standard of Decision

9. The decision to disqualify an attorney is within the Court's discretion. *Robinson & Lawing, L.L.P. v. Sams*, 161 N.C. App. 338, 339, 587 S.E.2d 923, 925 (2003).

10. "[T]he goal of maintaining public confidence in our system of justice demands that courts prevent even the appearance of impropriety and thus resolve any and all doubts in favor of disqualification." *Chemcraft Holdings Corp. v. Shayban*, No. 06

² These letters were attached to the original Motion to Disqualify as Exhibits 1, 2, 3, and 4. All citations and references to Exhibits 1, 2, 3, and 4 in this Amended Motion to Disqualify refer to Exhibits 1, 2, 3, and 4 attached to the original Motion to Disqualify.

CVS 5227, 2006 WL 2839255, at *4 (N.C. Super. Oct. 5, 2006). “In preventing the appearance of impropriety, the client’s perception of events is of paramount importance and overshadows the details of his attorney’s conduct.” *Id.*

11. “The conduct of the attorney need not constitute a violation of the Rules of Professional Conduct, and certainly need not rise to the level of professional negligence in order to warrant disqualification.” *Id.*

12. “Where a reasonable client would be concerned by a potential conflict, a court must err on the side of disqualification.” *Id.* (citations omitted).

The Department and the SHP Are a United Entity

13. The SHP is created by N.C. Gen. Stat. § 135-48.2 and governed by article 3B of chapter 135 of the North Carolina General Statutes. (Pet. ¶ 2). It provides health benefits coverage to hundreds of thousands of North Carolina teachers, state employees, retirees, and their dependents. (Pet. ¶ 2).

14. The SHP was transferred in 2011 by S.L. 2011-85 § 2.2 to the Department from the North Carolina General Assembly via a Type II transfer. *See* § 143A-6.

15. As a result of the transfer of the SHP to the Department in 2011, the SHP is now a division of the Department. (Ex. A ¶¶ 16-18; *Divisions, State Health Plan*, NORTH CAROLINA DEPARTMENT OF TREASURER, <https://www.nctreasurer.com/> (last visited April 17, 2023)).

16. In 2017, significant changes were made by S.L. 2017-57, particularly to § 35.22, which increased the Treasurer’s administrative and managerial authority and had

the effect of more closely integrating the SHP into the Department as one of its divisions. (Ex. A ¶¶ 16-17).

17. The SHP is managed, operated, and administered by the Treasurer and Department. (Ex. A ¶¶ 20-21; N.C. Gen. Stat. § 135-48.30(a)(1); *Quaicoe v. Moses H. Cone Mem'l Hosp. Operating Corp.*, 274 N.C. App. 306, 308-9, 852 S.E.2d 399, 401-2 (2020)).

18. The Treasurer may delegate his or her powers and duties to operate and administer the SHP “to the Executive Administrator, the Board of Trustees, and employees of the Plan. In delegating powers or duties, however, the State Treasurer **maintains the responsibility for the performance of those powers or duties.**” N.C. Gen. Stat. § 135-48.30(b) (emphasis added).

19. The Treasurer appoints and has authority to remove the SHP’s Executive Administrator and Deputy Executive Administrator, employs the clerical and professional staff, and provides other assistance necessary to run the SHP. N.C. Gen. Stat. § 135-48.23(b), (c1).

20. The Treasurer is responsible for adopting rules to implement the SHP. N.C. Gen. Stat. § 135-48.25.

21. As a result, the Treasurer and Department are responsible for the SHP along with any actions or decisions related to the SHP. (Ex. A ¶¶ 17-25).

22. The Treasurer serves as an ex officio member of the Board of Trustees of the State Health Plan for Teachers and State Employees (“Board”), serves as its Chair, and has tie-breaking voting power. N.C. Gen. Stat. § 135-48.20(c).

23. The Board is required to approve any contract exceeding \$3,000,000, including the SHP's TPA contract at issue here. N.C. Gen. Stat. § 135-48.33.

24. The Treasurer and Board must carry out their duties and responsibilities as fiduciaries to the SHP. N.C. Gen. Stat. § 135-48.2(a); *see* §§ 147-69.2A(a), -69.3(a), (e), (i2), and -69.7

25. As a division of the Department, the SHP is integrated with and intertwined with the Department (Ex. A ¶ 17), as shown by the overlapping officers and personnel as alleged herein.

26. The SHP is not a subsidiary of the Department. (Ex. A ¶ 18). A single human resources team, a single legislative affairs team, a single communications team, and a single legal team supports the entire Department, including the SHP and all other Department divisions. (Ex. A ¶ 19). The Treasurer maintains leadership and responsibility for all divisions, including the appointment and removal of personnel. (Ex. A ¶ 19). Since 2015, the SHP has shared the same facilities as the rest of the Department, and the same personnel policies apply. (Ex. A ¶ 19).

27. Indeed, Fox Rothschild LLP, has been engaged by the Department and by the Treasurer, in his capacity as fiduciary and manager of the SHP, to represent them, including the SHP, in this contested case. (Ex. A ¶¶ 22-23).

28. In light of these overlapping relationships between the Department, the Treasurer, and the SHP, there is no separate legal counsel for the SHP in this matter. (Ex. A ¶¶ 23-24).

29. Similarly, the Department has not moved to intervene in this matter to protect its interest because it is involved in this matter via the SHP. (Ex. A ¶ 25). Because the SHP and the Department are an integrated whole as a North Carolina executive branch state agency, any defense in the name of the SHP is a defense of the Department, alleviating any need for the Department to intervene. (Ex. A ¶ 25).

RBH's Former Client Relationship With the Treasurer and Department

30. The Department first became aware of RBH's representation of BCBS in connection with the TPA services contract award on January 12, 2023, upon receipt of BCBS's Request for Protest Meeting, which was subsequently denied by letter dated January 20, 2023. (Ex. A ¶ 8).

31. On January 20, 2023, the Department sent a letter to RBH raising the issue of RBH's potential conflict as BCBS's counsel. (Ex. 1; Ex. A ¶ 9).

32. On January 26, 2023, RBH provided a letter to the Department responding to the Department's inquiry. (Ex. 2; Ex. A ¶ 12).

33. In its January 26, 2023, letter, RBH admitted the following:

- a. "[RBH] has had recent and ongoing engagements with the North Carolina Department of State Treasurer..." (Ex. 2, p. 3).
- b. "Specifically, the firm has had recent engagements with the Department for investment transaction matters and, although [RBH] [has] no active matters in which [RBH] [is] serving as bond counsel on a State bond issue, the firm remains a member of the pool of pre-qualified public finance and bond counsel firms who may provide such services to the Department." (Ex. 2, p. 3).
- c. "As these agreements confirm and you noted in your letter, our firm's existing client relationship is with the Department, or with the State Treasurer through the Department." (Ex. 2, p. 4).

34. RBH’s January 26, 2023, letter also describes the language found in its engagement letters with the Treasurer and Department, confirming its former client relationship, as follows:

- a. *“Investment Transaction Engagements.* Our engagement agreements for investment transaction matters state that we are being engaged ‘[t]o represent you [the State Treasurer], through the North Carolina Department of State Treasurer (the ‘Department’), in connection with the investment to be made by you or at your direction on behalf of the North Carolina Retirement System and other plans and funds managed by you (collectively, for purposes of this engagement letter, ‘NCRS’) in [the specific investment at issue].’ **Our engagement agreements are countersigned by the State Treasurer.**” (Ex. 2, p. 3) (emphasis added).
- b. *“Public Finance Counsel and Bond Counsel Pool Agreement.* In our role as a member of a three-firm pool of pre-qualified public finance counsel and bond counsel for State bond issues, **our written agreement is with the Department.** That agreement contemplates that we will provide services to the Department and its State and Local Government Finance Division. The most recent extension of the agreement was countersigned by a representative of the North Carolina Department of State Treasurer, State and Local Government Finance Division, **and approved by the State Treasurer.**” (Ex. 2, pp. 3-4) (emphases added).

35. On February 16, 2023, the Department responded via letter to RBH’s January 26, 2023, letter, disagreeing with RBH’s conclusion and analysis, informing RBH the Department believed there was a conflict, and requesting RBH to address it. (Ex. 3; Ex. A ¶ 13).

36. On March 10, 2023, RBH responded to the Department’s February 16, 2023, letter further explaining its position that RBH does not have a concurrent client conflict of interest. (Ex. 4; Ex. A ¶ 14).

37. As noted above in paragraphs 7 and 8, some of the concerns addressed in these letters have been obviated by the departure from RBH of the attorney who had assisted with the investment transaction. Nevertheless, these letters indicate that RBH contended that no conflict existed even while its attorney actively represented the Treasurer and the Department.

38. RBH's reliance on the fact that its engagement letters with the Department and the Treasurer do not refer to the SHP fails to account for the actual interlocking structure of the Department and the SHP.

RBH's Representation Violates its Duties to its Former Client Under Rule of Professional Conduct 1.9

39. "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." N.C. Rev. R. Prof'l Conduct 1.9(a).

I. The Department's and Treasurer's Interests Are Materially Adverse to RBH's Representation.

40. Petitioner's contested case is entirely based on allegations that the Department's and the Treasurer's actions were erroneous, arbitrary, and capricious.

41. Specifically, Petitioner makes the following relevant allegations:

a. "The Plan made that award by applying arbitrary criteria, by failing to gather and consider critical information, and by using a distorted scoring system. Because of those flaws, the process that led to this award was an improper procedure, and the Plan's award to Aetna was erroneous, arbitrary, and capricious." (Pet. intro ¶¶ p. 1);

- b. “The Plan issued the RFP on August 30, 2022.” (Pet. ¶ 6);
- c. “[T]he Plan did not evaluate any vendor’s provider network...evaluate how many providers in the Plan’s current Blue Cross NC network would not be included in Aetna’s network. Nor did the plan evaluate how many members would be forced to change providers because of differences in the networks offered by Blue Cross NC and Aetna”. (Pet. ¶ 8);
- d. The RFP used a flawed scoring method (Pet. ¶ 26);
- e. The Plan refused to receive information on any vendor’s technical capabilities without context, clarification, or explanation which was a departure from other RFPs (Pet. ¶¶ 30-32);
- f. “On January 20, 2023, the Plan sent Blue Cross NC a letter denying the meeting request.” (Pet. ¶ 41);
- g. “[T]he RFP’s scoring system did not score the vendors’ provider networks.” (Pet. ¶ 46);
- h. “The Plan admits that it did not compare the provider networks offered by Blue Cross NC and Aetna during the RFP process.” (Pet. ¶ 48);
- i. “Issuing the award to Aetna without scoring the vendors’ networks of providers, and without accounting for the disruption that the award would cause, was erroneous, arbitrary, and capricious.” (Pet. ¶ 52);
- j. “Even when the RFP’s scoring process did assign scores, it assigned those scores in a flawed way.” (Pet. ¶ 53);
- k. “[T]he Plan did not test the accuracy of any vendor’s self-reported pricing or discounts.” (Pet. ¶ 56).
- l. “Because the Plan did not validate the accuracy of Aetna’s network-pricing proposal, the Plan made a significant scoring error...” (Pet. ¶ 58);
- m. “[T]he RFP’s weights and scoring methods for administrative fees and networking-pricing guarantees were an improper procedure. Those weights and scoring methods led to an arbitrary, capricious, and erroneous award.” (Pet. ¶ 73);
- n. “In sum, Blue Cross NC had good reasons for not confirming seven out of the 310 technical requirements in the RFP...The Plan’s decision to prohibit Blue Cross NC from providing this information prevented the plan from fully evaluating Blue Cross NC as a vendor and rendered the Plan’s decision erroneous, arbitrary, and capricious.” (Pet. ¶¶ 106-7);
- o. “Plan officials told Blue Cross NC that it did not win the award because of those seven responses [to the RFP].” (Pet. ¶ 83);
- p. “[T]he formula that the Plan used to calculate each vendor’s overall score and rank was unsound, arbitrary, and capricious.” (Pet. ¶ 108); and

q. “This scoring system has no rational basis, was an improper procedure, and was arbitrary and capricious.” (Pet. ¶ 112).

42. These allegations involve the application of criteria set out in the RFP, the gathering and considering of information, and the scoring system used for BCBS’s application, all of which were set out by SHP personnel under the direction and guidance of the Department and the Treasurer. (Ex. A ¶ 38).

43. After being duly appointed by, and under the direction and supervision of, the Treasurer and Department, SHP personnel drafted the RFP, reviewed, considered, and evaluated the responses of the insurers that made submissions, and scored the RFP based on those responses. (Ex. A ¶ 39). The recommendation of those SHP personnel was to award the SHP TPA contract to Aetna. (Ex. A ¶ 40). The SHP Board of Trustees, which the Treasurer chairs, then voted unanimously to approve the award to Aetna. (Ex. A ¶ 41).

44. To prove its case, RBH, on behalf of Petitioner, must take factual and legal positions challenging these actions and decisions.

45. RBH admits that the SHP “is to be administered under the direction and supervision of the Department and certain ‘management functions’ (e.g., planning, organizing, staffing, directing, coordinating, reporting, and budgeting) are to be performed under the direction and supervision of the State Treasurer as head of the Department...” (Ex. 2, p. 4).

46. Yet, Petitioner now challenges the Department’s and Treasurer’s involvement in the SHP’s TPA RFP process, as carried out by SHP personnel under the Department’s and Treasurer’s direction and supervision.

47. Petitioner's challenges, which are disputed, are against the Treasurer's and Department's interest as they allege error and abuse by the Department and criticize the Treasurer's performance and delegation of his fiduciary duties. (Ex. A ¶ 42).

48. A firm is prohibited from prosecuting claims against a party with which they have no relationship if the claims will require them to take factual and legal positions adverse to their current or former client's interest. *See e.g. Kingsdown, Inc. v. Hinshaw*, No. 14 CVS 1701, 2015 WL 1880599, at *4 (N.C. Super. Apr. 22, 2015).

49. In *Kingsdown*, the firm of Tuggle Duggins P.A. was disqualified from representing their client Kingsdown, which brought suit alleging breach of fiduciary duty, constructive fraud, and conspiracy against a party with whom the firm had no relationship, defendant Ann Ray. *Id.* The reason for the disqualification was that Tuggle Duggins would have been required to take factual and legal positions that a former client, co-defendant Eric Hinshaw, disputed and were against his interest. *Id.*

50. If Tuggle Duggins was disqualified from pursuing claims against co-defendant Ray, a party with whom it had no relationship, because those claims would have involved facts and legal positions contrary to the interest of co-defendant Hinshaw, its former client, it necessarily follows that BCBS's allegations, which require proof that RBH's former client failed to perform its fiduciary duties, require disqualification.

II. RBH's Representation Is Substantially Related to its Representation of the Department and Treasurer as Fiduciary in Prior Matters

51. RBH has previously represented the Treasurer through the Department. (Ex. A ¶¶ 31-33; Ex. 2., pp. 3-4).

52. Specifically, RBH represented the Treasurer for investments made by him or at his direction on behalf of the NCRS. (Ex. A ¶¶ 33-35). The NCRS are administered by two divisions of the Department. (Ex. A ¶ 26). The SHP is another division of the Department. (Ex. A ¶ 28). The Treasurer is a fiduciary of both the NCRS and the SHP and is required to manage each (directly or through appointees), and each has a board of trustees (in the case of NCRS, there are multiple boards of trustees). (See Ex. A ¶¶ 26-30; N.C. Gen. Stat. §§ 135-48.2(a), 147-69.2A(a), -69.3(a), (e), (i2), and -69.7).

53. In addition, RBH was part of a pool of law firms that provided bond services to the Department's State and Local Government Finance Division ("SLGFD"), another Departmental division that is similar to the SHP and the divisions administering the NCRS. (Ex. A ¶¶ 28-32). The Treasurer was responsible for managing and supervising these investments a fiduciary of the SLGFD. (Ex. A ¶¶ 30, 32).

54. Petitioner, through RBH, now challenges the Treasurer's actions as fiduciary of the SHP.

55. Specifically, RBH claims the process leading to the award of the SHP's 2025–2027 TPA services contract to Aetna, as guided, directed, and supervised by the Treasurer pursuant to his fiduciary duties, was arbitrary and capricious. (See Pet. intro ¶¶, p. 1).

56. "A decision is arbitrary and capricious if it was 'patently in bad faith,' 'whimsical,' or if it lacked fair and careful consideration." *Teague v. W. Carolina Univ.*, 108 N.C. App. 689, 692, 424 S.E.2d 684, 686 (1993) (citations omitted).

57. Fiduciaries, however, must act in good faith and with due regard. *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001).

58. The Treasurer could not have acted with good faith and due regard if the award of the TPA contract to Aetna was arbitrary and capricious.

59. As a result, RBH's prior representation of the Treasurer supporting the Treasurer's fiduciary duties is substantially related to the current challenge which alleges that the Treasurer failed in his fiduciary duties.

60. The Treasurer has not consented to RBH's representation, and RBH should be disqualified. *See* N.C. Rev. R. Prof'l Conduct 1.9(a).

WHEREFORE, Respondent the North Carolina State Health Plan for Teachers and State Employees respectfully requests that the firm of Robinson, Bradshaw & Hinson, P.A. be disqualified as counsel for Petitioner Blue Cross and Blue Shield of North Carolina in this contested case. Though the undersigned are familiar with 26 NCAC 03.0115, lest there be any question, the undersigned consent to an extension of ten days from the date of filing of this Amended Motion for Petitioner to file a response.

This the 18th day of May, 2023.

NC STATE HEALTH PLAN

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing document was uploaded electronically with the Office of Administrative Hearings, causing electronic service, as defined in 26 N.C.A.C. 03 .0501(4), to be made upon the following:

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This the 18th day of May, 2023.

/s/ Robert H. Edmunds, Jr.
Robert H. Edmunds, Jr.

EXHIBIT A

**AFFIDAVIT OF SAMUAL W. WATTS
IN SUPPORT OF
AMENDED MOTION TO DISQUALIFY**

STATE OF NORTH CAROLINA
DURHAM COUNTY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
23 INS 738

BLUE CROSS AND BLUE SHIELD)
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HEALTH PLAN FOR)
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AETNA LIFE INSURANCE)
COMPANY)
)
Respondent-Intervenor.)

AFFIDAVIT OF SAMUEL W. WATTS
IN SUPPORT OF AMENDED
MOTION TO DISQUALIFY

The undersigned, being first duly sworn, declares as follows under penalty of perjury:

1. I, Samuel W. Watts, being duly sworn, deposes and says:
2. I am employed by North Carolina State Treasurer Dale R. Folwell, CPA (“Mr. Folwell” or “Treasurer”) and The North Carolina Department of State Treasurer (“Department”) in the position of Interim Executive Administrator of the North Carolina State Health Plan for Teachers and State Employees (“Respondent” or “SHP”) and Legislative Liaison and Senior Public Policy Advisor for the Department.

3. As the Interim Executive Administrator of the SHP and the Legislative Liaison and Senior Public Policy Advisor, I represent the Treasurer and Department, including the SHP.

4. My duties and responsibilities as Interim Executive Administrator of the SHP, on behalf of the Treasurer and Department, include managing and administering the programs and personnel necessary to provide health care benefits to the almost 740,000 members and dependents pursuant to the applicable statutory mandates. My duties and responsibilities as Legislative Liaison and Senior Public Policy Advisor, on behalf of the Treasurer and Department, include representing the same before the North Carolina General Assembly to support and further the Treasurer's and Department's goals pursuant to their constitutional and statutory authority and responsibilities.

5. I am familiar with and knowledgeable of the above captioned contested case filed by Petitioner Blue Cross Blue Shield of North Carolina ("Petitioner" or "BCBS"), including the petition and its allegations, and the firm of Robinson, Bradshaw & Hinson, P.A.'s ("RBH") representation of Petitioner.

6. I am familiar with and knowledgeable of the duties, responsibilities, structure, and relationship of the Treasurer and Department with the SHP.

7. I am familiar with and knowledgeable of the actions and decisions of the SHP, at the direction, supervision, and guidance of the Treasurer and Department, related to this contested case, including the award of the SHP's 2025–2027 contract for third-party administrator ("TPA") services to Aetna Life Insurance Company ("Aetna") and BCBS's request for proposal ("RFP").

The Department's and RBH's Communications Regarding RBH's Conflict

8. The Department first became aware of RBH's representation of BCBS in connection with the TPA services contract award on January 12, 2023, upon receipt of BCBS's Request for Protest Meeting, which was subsequently denied by the Department by letter dated January 20, 2023.

9. On January 20, 2023, the Department sent RBH a letter regarding RBH's potential conflict as BCBS's counsel.

10. The letter questioned how the North Carolina Rules of Professional Conduct allowed RBH to represent BCBS in this matter that is directly adverse to a division of the Department, the SHP, which the Department directs and manages.

11. The Department noted its surprise to learn of RBH's representation in this matter and the serious concerns it had given RBH's prior representation of the Treasurer and Department.

12. On January 26, 2023, RBH responded via letter to the Department's January 20, 2023, letter advising why RBH believed there was no conflict.

13. On February 16, 2023, the Department responded via letter to RBH's January 26, 2023, letter, disagreeing with RBH's conclusion and analysis, informing RBH the Department believed there was a conflict, and requesting RBH to address it.

14. On March 10, 2023, RBH responded to the Department's February 16, 2023, letter, further explaining its position that RBH does not have a concurrent client conflict of interest.

15. In addition to these letters, between January 20, 2023, and March 9, 2023, the Department and RBH engaged in telephone calls discussing the conflict.

Duties and Relationship of the Treasurer and Department with the SHP

16. The SHP was transferred in 2011 by S.L. 2011-85 to the Department from the North Carolina General Assembly via a Type II transfer. In 2017, significant changes were made by S.L. 2017-57 which increased the Treasurer's administrative and managerial authority of the SHP and had the effect of more closely integrating the SHP into the Department as one of its divisions.

17. The SHP has been a division of the Department, and integrated with and inextricably intertwined with the Department, during all times relevant to this contested case.

18. The SHP is not a subsidiary of the Department.

19. A single human resources team, a single legislative affairs team, a single communications team, and a single legal team supports the entire Department, including the SHP and all other Department divisions. The Treasurer maintains leadership and responsibility for all divisions, including the appointment and removal of personnel. Since 2015, the SHP has shared the same facilities as the rest of the Department, and the same personnel policies apply.

20. The SHP is managed, operated, and administered by the Treasurer, as a fiduciary, and Department. SHP personnel are directed and guided by the Treasurer and Department.

21. It is the Treasurer's and Department's responsibility to direct, oversee and run the SHP.

22. Due to their duties to and relationship with the SHP, the Treasurer and Department are responsible for hiring counsel to defend this action even though they are not specifically named in it.

23. The Department and Treasurer, in his capacity as fiduciary and manager of the SHP, retained Fox Rothschild, LLP, to represent the Treasurer and Department, including the SHP, in relation to this matter due to the overlapping, integrated, and intertwined relationship of the Treasurer and Department with the SHP.

24. Due to that relationship, the Treasurer and Department do not believe there is a need or that it would be appropriate to retain separate counsel for the SHP to defend this contested case.

25. The Department has not moved to intervene in this matter to protect its interest because it is involved in this matter via the SHP. Because it is the position of the Treasurer and Department that the SHP and the Department are an integrated whole as a North Carolina executive branch state agency, any defense in the name of the SHP is a defense of the Department, alleviating any need for the Department to intervene.

Department Divisions

26. The North Carolina Retirement Systems ("NCRS") are composed of certain state pension plans that are administered by the Retirement Services Division ("RSD") and the investments of which are managed by the Investment Management Division ("IMD"). Both the RSD and the IMD are divisions of the Department.

27. The RSD also facilitates the certain boards of trustees that are responsible for specific state pension plans, each of which have their own statutory authority and responsibilities. For example, the North Carolina Teachers' and State Employees' Retirement System ("TSERS") Board of Trustees is supported by RSD, and RSD implements the decisions and directions of that Board in addition to the directions of the Treasurer. The TSERS Board of Trustees has the power to sue and be sued pursuant to N.C. Gen. Stat. § 135-6.

28. The SHP, as another division of the Department, functions similarly with respect to its own particular Board of Trustees and that Board's, and the SHP's, own statutory authority and responsibilities.

29. Like the SHP, IMD, and RSD, the State and Local Government Finance Division ("SLGFD") is a division of the Department. As with those other divisions, the SLGFD facilitates the activity of a public body, the Local Government Commission, which has its own statutory authority and responsibilities.

30. The Treasurer is a fiduciary of the NCRS, IMD, and SHP. The Treasurer, as a fiduciary, and the Department are responsible for managing the RSD and IMD, and other plans and funds under N.C. Gen. Stat. § 147-65 *et seq.*, just as they are required to manage the SHP. As a result, the SHP, RSD, IMD, and SLGFD are integrated parts of the Department.

RBH's Engagements with the Department

31. The Department has previously retained RBH to serve with two other firms as members of a pool of pre-qualified public finance counsel and bond counsel for State

bond issues. RBH was retained through a representative of the SLGFD that was approved by the Treasurer.

32. RBH provided bond services to the SLGFD through the Treasurer, as a fiduciary, and Department.

33. RBH, including the attorney who has now left RBH, were previously engaged by the Department to assist with reviewing and revising the transaction documents for an investment on behalf of the NCRS.

34. This investment was with a long-time investment manager for the NCRS maintained through a series of separately managed accounts structured as a series LLC. RBH's engagement for the NCRS investment, as originally conceived, consisted of three parts: (1) work on a new commingled fund holding vehicle (Series 2), (2) work on the commingled main fund (in which Series 2 invested), and (3) work on a co-investment vehicle (Series 3).

35. RBH's work involved a deep review and necessary revisions to the Master LLC, work on a new commingled main fund holding vehicle (Series 2), and work on the commingled main fund (in which Series 2 invested). The closing for the Series 2 new commingled main fund holding vehicle was March 7, 2023.

The Department Does Not Consent to RBH's Representation of BCBS

36. In the Department's February 16, 2023, letter to RBH, and in additional phone calls, the Department informed RBH that it believed there is a conflict with RBH's prior representation of the Department and current representation of BCBS.

37. The Department maintains this position. The Treasurer and Department, including the SHP, do not consent to and oppose RBH's representation of BCBS in this contested case. The Treasurer and Department have not otherwise provided their consent to, or a waiver of, RBH's conflict.

The Treasurer's and Department's Actions Regarding BCBS's RFP

38. Under the supervision, guidance, and direction of the Treasurer and Department, SHP personnel established the application of criteria set out in the RFP to which BCBS, Aetna, and UMR, Inc. responded, what information was to be gathered and considered in relation to the RFP, and the scoring system used for the RFP application.

39. Under the supervision, guidance, and direction of the Treasurer and Department, SHP personnel drafted the RFP, reviewed, considered, and evaluated BCBS's responses and information provided in response to the RFP, and scored the RFP based on BCBS's responses.

40. Under the supervision, guidance, and direction of the Treasurer and Department, the SHP's Evaluation Committee recommended to award the SHP TPA services contract to Aetna.

41. The SHP Board of Trustees, which the Treasurer chairs, then voted unanimously to approve the award to Aetna.

42. The Treasurer and Department dispute BCBS's challenges to the RFP process documented in its Petition. It is the Treasurer's and Department's position that BCBS's allegations allege error and abuse by the Department and criticize the Treasurer's

performance and delegations of his fiduciary duties since they were responsible for supervising, guiding, and directing SHP personnel in the RFP process.

43. It is the position of the Treasurer and Department, including the SHP, that BCBS's responses to the RFP were fairly and appropriately reviewed and evaluated, and that the decision to award the TPA services contract to Aetna was proper.

44. The facts stated in this affidavit are within my personal knowledge and are true and correct to the best of my knowledge.

This the 17th day of May, 2023.



Samuel W. Watts

STATE OF NORTH CAROLINA

COUNTY OF WAKE

Sworn to and subscribed before me this day by: **Samuel W. Watts**

Date: May 17, 2023

Anne A. Roof
Anne A. Roof

Notary Public

[Notary Typed or Printed Name]

[Official Seal]

My Commission expires: 04-25-2026



This the 17th day of May, 2023.