ORDER ENTERED: September 11, 1996
TO BE PUBLISHED

NO. 96-CA-2406-MR

A.B. CHANDLER, III, ATTORNEY
GENERAL AND SHERIALL A. CUNNINGHAM — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
CIVIL ACTION NO. 96-CI-01263

HONORABLE JOHN J. HUGHES, HEARING
OFFICER, KENTUCKY DEPARTMENT OF
INSURANCE; COMMISSIONER GEORGE NICHOLS,
KENTUCKY DEPARTMENT OF INSURANCE; AND
SOUTHEASTERN UNITED MEDIGROUP, INC. — APPELLEES

ORDER

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BEFORE: COMBS, DYCHE, and KNOPF, Judges.

A.B. Chandler, III, Kentucky's Attorney General, on behalf of himself and health insurance policy holders of the Commonwealth, and Sheriall Cunningham, an affected policy holder (appellants), appeal an order of Franklin Circuit Court denying their petition for a writ of prohibition.[1] Commissioner Nichols of the Department of Insurance, although nominally an appellee, has also submitted briefs and participated in oral arguments in

[1]Appellants brought their petition pursuant to KRS 23A.080(2) and CR 81; they bring this appeal pursuant to Cr 76.33 and CR 76.34.

support of the appellants. Citing Senate Bill No. 343, the General Assembly's recent, extensive revision of laws relating to health care and health insurance in Kentucky, these parties seek an order prohibiting John Hughes, a hearing officer for the Department of Insurance, from denying public access to certain information. For the reasons discussed below, we reverse the order of the circuit court and remand with instructions to grant the writ of prohibition.

This matter arises from a rate proceeding currently before the Insurance Commission.[2] Southeastern United Medigroup, Inc. (SUMI), is seeking Commission approval to increase premium rates for two of its health insurance products. Because SUMI's rate application did not include certain materials the Department of Insurance (DOI) deemed necessary, DOI and the Attorney General issued a discovery request for the additional information. In response to that request, SUMI moved for a protective order. It sought to prevent public disclosure of much of the requested information on the ground that it was proprietary. It argued that the information was exempt from mandatory disclosure pursuant to KRS 61.878 (the exemption provisions of the Open Records Act (KRS 61.870 - 61.884)), which is applicable to rate filings pursuant to KRS 304.2-150(3).

DOI and the AG contended that sections 16(2) and 16(6) of SB 343 evince the legislature's intent to provide meaningful

[2] In the Matter of: Southeastern United Medigroup, Inc. Rate Filing Applications Nos. 2195 and 2326.

public access to the Commission's rate adjustment hearings. They argue that that intent would be frustrated were the public denied access to the contested information and excluded from the proceedings whenever that information was to be considered.

The hearing officer noted that all parties to the proceeding, including intervenors, would have access to SUMI's complete application and that the AG, in his role as consumer advocate and representative, would necessarily be a party. He rejected the AG's construction of SB 343 and ruled that under KRS 13B.090(3), proprietary information necessary to an administrative decision may be placed under an appropriate seal. Without making specific findings of his own as to the proprietary nature of the materials at issue, he accepted and adopted the representations of SUMI's experts that the information SUMI sought to protect was in fact proprietary and granted the motion prohibiting public access to it.

The circuit court, denying appellants' petition for a writ of prohibition, found that extraordinary relief would be inappropriate because in its view appellants have an adequate remedy by appeal from the Insurance Commissioner's final decision. This appeal followed.

Because the circuit court entertained this matter in its capacity as a court of appeal, we review its decision anew. We ask, as it did, whether the hearing officer is about to proceed either outside his authority or incorrectly, and if so whether the appellants are apt to suffer significant injury

without an adequate remedy by appeal. Tipton v. Commonwealth, Ky. App., 770 S.W.2d 239 (1989).

We agree with the hearing officer that SB 343 does not necessarily require public disclosure of all information filed in support of a rate change. However, KRS 304.2-150(3), part of the General Assembly's 1994 revision of the health insurance laws, and sections 15 and 16 of SB 343 demonstrate the legislature's continuing determination to create a more open process for modifying insurance rates in Kentucky. SB 343 in particular sets forth a presumption that materials related to insurance rate increases are subject to disclosure.

KRS 304.2-150(3) provides in part that rate and form filings and information filed in support thereof "shall be open." Despite that directive's seeming clarity, it and other changes adopted by the General Assembly in 1994 have failed to effect much openness in the system for adjusting insurance rates. The 1996 legislation goes further. SB 343 requires the Commissioner to perform a thorough review of all recently modified health insurance rates and allows him to order rebates of any charges he deems excessive. It requires him to conduct public hearings concerning any subsequent requests for rate increases more than three percent above the medical rate of inflation. It specifically mandates the involvement of the AG as a party in rate hearings. It authorizes the Commissioner to adopt regulations specifying additional information that must accompany rate filings. And it allows the Commissioner in appropriate

circumstances to withdraw approval for a rate and order refunds of unreasonable charges. SB 343 §§ 15-16.

We believe these statutes demonstrate a legislative intent to protect both the substance and the appearance of fairness in insurance rate hearings and, as a means thereto, to provide for bona fide public participation in the process. To make public participation meaningful, these statutes contemplate disclosure of rate filings in a manner likely to apprise interested policy holders of their stake in the proceeding. They also contemplate public access to the information at the heart of the rate adjustment decision.

Given this legislative concern for openness, we think that any exceptions to public disclosure of rate filing information must be justified by findings setting forth compelling reasons for confidentiality. After a thorough review of the transcript of the hearing, we are convinced that the evidence offered by SUMI in support of confidentiality did not overcome the statutory presumption of openness and disclosure. Based on the record before us, we find that it was error for the hearing officer to characterize the materials at issue as proprietary and entitled to confidential protection.

Hearing officer Hughes did not make clear the standard he used to determine whether the information SUMI sought to protect was proprietary. Cf. KRS 365.880-900, the Uniform Trade Secrets Act. Nor did he sufficiently indicate how that standard applied to SUMI's claims. He seems instead to have relied wholly

on conclusory representations by SUMI's witnesses. That his inquiry was not sufficiently searching has been indicated by SUMI's subsequent concession before this court that ninety percent of the information it originally sought to protect might safely be disclosed.

Therefore, we hold that all the remaining items on the "contested list"[3] are subject to disclosure with the exception of copies of the tax returns and the copies of year ending trial balances (referred to as ACCOUNTING, HICI Production Items, nos. 11 and 4 respectively). With respect to the tax returns and year end trial balances, the appellants have filed with this Court (on 9/9/96) a notice of position withdrawing their contention that these items should be public per se. Should the appellants resume their claim to these items or, in general, should they later seek access to additional materials, such materials are to be presumed subject to disclosure absent specific findings by the hearing officer of a compelling need for confidential handling.

We thus conclude that hearing officer Hughes is about to proceed incorrectly, inappropriately denying access to information the General Assembly has deemed should be available to policy holders and insurance consumers.

In invoking the extreme relief sought in this case, the appellants are correct in asserting that there would be no adequate remedy on appeal. If the hearing officer were to base his findings on the standard of confidentiality couched in KRS

[3]Appendix A to the hearing officer's order of 8/26/96.

61.878, rather than on the more specific standard recently enacted as SB 343, the remedy on appeal would inevitably be inadequate. We are bound by the "substantial evidence" standard of review as an appellate court--a standard which demands a high degree of deference by the reviewing court as to the findings of a hearing officer. As those findings would appear regular on their face, the erroneous basis on which they rested would not be apparent. For an appellate remedy to be adequate, it is critical that this error be discovered and flushed out at the threshold stage of the administrative proceedings. Additionally, would-be intervenors, who failed to realize their need to intervene because of inadequate public disclosure of information, would have no remedy whatsoever on appeal, their stake in the issue having been permanently lost and rendered moot before an appeal could be brought. Moreover, the procedural changes called for by SB 343 affect not only this case, but all subsequent rate filings as well. The orderly administration of these hearings is dependent upon an interpretation of the new law. Bender v. Eaton, Ky., 343 S.W. 2d 799 (1961).

For these reasons, we reverse the order of Franklin Circuit Court and remand to that court for issuance of a writ prohibiting the Insurance Commission's hearing officer from denying public access to any information submitted in support of Southeastern United Medigroup, Inc.'s request for a rate change except as provided herein. The stay of the administrative hearing imposed by this Court on September 4, 1996, is hereby

lifted to permit the administrative process to continue in compliance with the provisions of this Order.

ALL CONCUR.

ENTERED: September 11, 1996 \s\ Sara Combs
JUDGE, COURT OF APPEALS