

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-07-110
JMJ - KEN - 1/16/2008

MAINE HEALTH CARE
ASSOCIATION, WORKERS
COMPENSATION FUND,
Petitioner

v.

DECISION AND ORDER

MAINE BUREAU OF INSURANCE,
ERIC A. CIOPPA,

ROBERT A. WAKE, HEARING OFFICER,

Respondents¹

DONALD L. GARBRECHT
CLERK

BORDERVIEW REHABILITATION AND
LIVING CENTER,

THE CHAPMAN HOUSE,

EVERGREEN MANOR NURSING AND
REHABILITATION,

FEB 15 2008

Parties-in-Interest

This is a M.R. Civ. P. 80C petition for judicial review of final agency action. On April 11, 2007 this court issued a Temporary Restraining Order enjoining the Superintendent from ordering the disclosure of information discussed below. Pursuant to the TRO, the Superintendent suspended its Order on a Motion to Compel and continued the underlying administrative hearing until such time as a judicial order resolved the matters herein discussed. On May 16, 2007, this court ordered the dismissal of Counts I (an Appeal of Freedom of Access Decision) and III (a Declaratory

¹ Respondent, Superintendent of Insurance contends and petitioner does not appear to dispute, that it is the proper respondent in this action and not the Bureau of Insurance, Eric A. Cioppa (acting Superintendent of Insurance) and Robert Alan Wake (the hearing officer in the administrative case).

Judgment Action) of the original complaint with prejudice. This left only the M.R. Civ. P. 80C action for adjudication. The scope of judicial review was further limited to whether the Superintendent's Order on Motion to Compel, dated April 6, 2007 should be affirmed, remanded, reversed or modified based on whether it was in violation of constitutional or statutory provisions, in excess of the statutory authority of the agency, made upon unlawful procedure, affected by bias or error of law, unsupported by substantial evidence on the whole record, or arbitrary and capricious or characterized by abuse of discretion. *See* 5 M.R.S.A. §§ 11007(4)(C)(1)-(6).

FACTS

The Superintendent's Order on Motion to Compel was based on three former members ("former members") of the Maine Health Care Association Worker's Compensation Fund ("the Fund") contestation of assessments levied against them by the Fund to cover their proportionate shares of the Fund's worker's compensation self-insurance liabilities for the period that they were members. The former members alleged that the Fund failed to follow required Bureau of Insurance procedures in levying the assessment and failed to provide the former members with information requested to verify the followed methodology for assessment. The Fund contended that the information should be protected as confidential under 39-A M.R.S.A. § 403(15), however a Hearing Officer on behalf of the Superintendent, determined that the purpose of disclosure was not for public information, rather it was for proceeding in the case before the Superintendent, and accordingly allowed disclosure under a protective order. The Hearing Officer granted the former members' motion to compel subject to the following conditions:

- (1) The Fund shall redact claimants' names and other individually identifying information from the information provided;
- (2) The Petitioners and their agents shall not redisclose of [sic] any of the information provided except on a need-to-know basis for purposes of this proceeding to persons who have agreed to a similar prohibition against redisclosure and to the jurisdiction of the Superintendent and the courts of this State for purposes of enforcing this Order;
- (3) To the extent that the Fund reasonably identifies particular information as competitively sensitive between present or former members of the Fun, the fund may be provided that information on an "eyes of counsel and expert consultant only" basis rather than to the Petitioners themselves;
- (4) The parties are encouraged to stipulate to appropriate protective order language consistent with this Order, and in the event of impasse may propose suggested language to the Hearing Officer with notice to other parties.

STANDARD OF REVIEW

Pursuant to M.R. Civ.P. 80C, this Court reviews an agency's decision directly for abuse of discretion, errors of law, or findings not supported by the evidence. *Centamore v. Dep't of Human Services*, 664 A.2d 369, 370 (Me. 1995). "An administrative decision will be sustained if, on the basis of the entire record before it, the agency could have fairly and reasonably found the facts as it did." *Seider v. Board of Exam'r of Psychologists*, 2000 ME 206 ¶9, 762 A.2d 551, 555 (Me. 2000) (citing *CWCO, Inc. v. Superintendent of Ins.*, 1997 ME 226, ¶6, 703 A.2d 1258, 1261 (Me. 1997)). In reviewing the decisions of an administrative agency, the Court should "not attempt to second-guess the agency on matters falling within its realm of expertise" and the Court's review is limited to "determining whether the agency's conclusions are unreasonable, unjust or unlawful in light of the record." *Imagineering v. Superintendent of Ins.*, 593 A.2d 1050, 1053 (Me. 1991). The focus on appeal is not whether the Court would have reached the same conclusion as the agency, but whether the record contains competent and substantial evidence that supports the result reached by the agency. *CWCO, Inc.*, 1997 ME 226, 703

A.2d 1258, 1261. "Inconsistent evidence will not render an agency decision unsupported." *Seider*, 762 A.2d 551 (citations omitted). The burden of proof rests with the party seeking to overturn the agency's decision, and that party must prove that no competent evidence supports the Board's decision. *Id.* "[Petitioner] must prove that no competent evidence supports the Board's decision and that the record compels a contrary conclusion." *Bischoff v. Board of Trustees*, 661 A.2d 167, 170 (Me. 1995). Factual determinations must be sustained unless shown to be clearly erroneous. *Imagineering*, 593 A.2d at 1053 (noting that the Court recognizes no distinction between the clearly erroneous and substantial evidence in the record standards of review for factual determinations made by administrative agencies).

DISCUSSION

Petitioner contends that the decision of the Superintendent to release certain material, which it argues is designated confidential, was incorrect and should be reversed. It argues that even the limited disclosure of this information will harm the financial and competitive interests of the Fund and would invade the privacy of its group members. Petitioner argues that it has provided ample information to the former members during the course of a six month discussion of obligations and requirements upon their decision to leave the fund. (R. at 49-128.) Petitioner contends that the information it has already provided to its former members is all that they are entitled to in their challenge the reasonableness or justness of the petitioner's assessment of the former members liabilities.

39-A M.R.S.A. § 403(15) provides that:

All written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form susceptible of visual or aural comprehension, all

information contained in the minutes of trustee meetings and all information relating to individual compensation cases, that a self-insurer is required to file with or make available to the superintendent under this section, section 404 or rules adopted pursuant to it are confidential and are not public records.

The confidential nature of this information does not limit or affect its use by the superintendent in administering this Act, but not limited to, communications with the service agent, the Worker's Compensation Board or the Maine Self-Insurance Guarantee Association.

This court need go no further than the text of the statute. The statute explicitly states that "the confidential nature of this information does not limit or affect its use by the superintendent in administering this act." This is consistent with the discovery of evidence for a proceeding conducted by the Superintendent to adjudicate the veracity of the former members' claim.

Petitioner also argues that the information is entitled to Trade Secret Privilege protection under M.R. Evid. 507:

A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. When disclosure is directed, the court shall take such protective measures as the interest of the holder of the privilege and of the parties and the furtherance of justice may require.

The trade secret privilege is not absolute. *Federal Open Market Committee v. Merrill*, 443 U.S. 340 (1979). The test requires that the party asserting the privilege must first prove that the information protected is a trade secret by proving that disclosure would be harmful. *Cutler v. Lewiston Daily Sun*, 105 F.R.D. 137, 140 (D. Me. 1985) (citations omitted). If that's proven the burden shifts to the other party to establish that discovery of the secret is relevant and necessary to the action. *Id.* If that is proven the factfinder balances need for protection against injury caused by disclosure. *Id.* "Discovery should be denied if proof of relevancy or need is not established, but if

relevancy or need are shown, the trade secret should be disclosed.” *Id.* Discretion as to “whether the need outweighs the harm of disclosure” is given to the factfinder. *Id.*

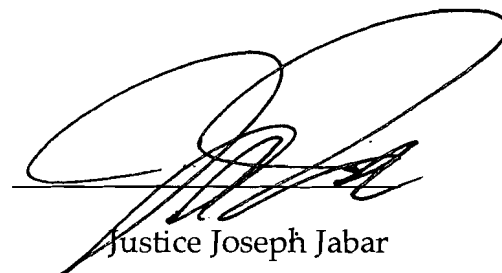
The Hearing Officer sitting as fact-finder appears to have committed no error in finding as he did, balancing between the rights of the parties, finding that some information likely was protected trade secrets and finally fashioning conditions for disclosure to protect such proprietary information. Ultimately, if it is established that the information is confidential or proprietary and the former members’ request is not “merely frivolous”, the question becomes whether the necessity of disclosure to the party seeking disclosure outweighs the harm caused by disclosure. *See Bruno & Stillman, Inc. v. Global Newspaper Co.*, 633 F.2d 583, 597-98 (1st Cir. 1980). However, the Hearing Officer had wide latitude under M.R. Civ. P. 26(c) to fashion an order that authorizes “a trade secret or other commercial research, developmental or commercial information not be disclosed or disclosed only in a designated way.” *See Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 532 (1st Cir. 1993) (finding wide latitude to the court in framing a protective order liberally calculated toward protection of the interests of the parties). The conditions issued by the Hearing Officer in its order on the motion to compel seem well calculated to protect the proprietary value of the evidence.

For the reasons stated above, the petitioner’s Rule 80 C Appeal is hereby denied.

The entry is:

The Superintendent’s order is AFFIRMED.

January 16, 2008



Justice Joseph Jabar

Attorney for the petitioner:

Michael Saucier, Esq.

Attorney for respondent:

Thomas Sturtevant, Esq.

Attorney for parties-in-interest:

Robert Kline

MAINE HEALTH CARE ASSOCIATION WORKERS - PLAINTIFF
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Attorney for: MAINE HEALTH CARE ASSOCIATION WORKERS
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THREE CANAL PLAZA
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PORTLAND ME 04112-4630

SUPERIOR COURT
KENNEBEC, ss.
Docket No AUGSC-CV-2007-00110

DOCKET RECORD

vs

MAINE BUREAU OF INSURANCE, ERIC A. CIOPPA - DEFENDANT

,
Attorney for: MAINE BUREAU OF INSURANCE, ERIC A. CIOPPA
THOMAS C STURTEVANT JR - RETAINED
ATTORNEY GENERAL OFFICE OF AG
111 SEWALL STREET
6 STATE HOUSE STATION
AUGUSTA ME 04333-0006

ROBERT A WAKE - DEFENDANT

,
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BORDERVIEW REHABILITATION & LIVING CENTER - PARTIES IN INTEREST

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Filing Document: COMPLAINT
Filing Date: 04/09/2007

Minor Case Type: DECLARATORY JUDGMENT

Docket Events:

04/09/2007 FILING DOCUMENT - COMPLAINT FILED ON 04/09/2007

04/09/2007 Party(s): MAINE HEALTH CARE ASSOCIATION WORKERS
ATTORNEY - RETAINED ENTERED ON 04/09/2007
Plaintiff's Attorney: MICHAEL E SAUCIER

04/09/2007 CERTIFY/NOTIFICATION - CASE FILE NOTICE SENT ON 04/09/2007
Plaintiff's Attorney: MICHAEL E SAUCIER
MAILED TO ATTY. OF RECORD.

04/09/2007 Party(s): MAINE HEALTH CARE ASSOCIATION WORKERS
MOTION - TEMP RESTRAINING ORDER FILED ON 04/09/2007
Plaintiff's Attorney: MICHAEL E SAUCIER
COMPLAINT AND REQUEST FOR DECLARATORY JUDGMENT INJUNCTIVE RELIEF WITH PROPOSED ORDER.

04/11/2007 Party(s): MAINE HEALTH CARE ASSOCIATION WORKERS
MOTION - TEMP RESTRAINING ORDER GRANTED ON 04/11/2007
DONALD H MARDEN , JUSTICE
COPIES TO PARTIES/COUNSEL

04/11/2007 HEARING - MOTION PRELIMINARY INJUNCTION SCHEDULED FOR 04/17/2007 @ 8:30
DONALD H MARDEN , JUSTICE

04/13/2007 Party(s): MAINE BUREAU OF INSURANCE, ERIC A. CIOPPA, ROBERT A WAKE
LETTER - FROM PARTY FILED ON 04/13/2007
Defendant's Attorney: THOMAS C STURTEVANT JR
LETTER ENTERING APPEARANCE FOR DEFTS.

04/13/2007 Party(s): MAINE BUREAU OF INSURANCE, ERIC A. CIOPPA
ATTORNEY - RETAINED ENTERED ON 04/13/2007
Defendant's Attorney: THOMAS C STURTEVANT JR

Party(s): ROBERT A WAKE
ATTORNEY - RETAINED ENTERED ON 04/13/2007
Defendant's Attorney: THOMAS C STURTEVANT JR

04/13/2007 Party(s): MAINE BUREAU OF INSURANCE, ERIC A. CIOPPA, ROBERT A WAKE
MOTION - DETERMINE COURSE PROCEEDINGS FILED ON 04/13/2007
Defendant's Attorney: THOMAS C STURTEVANT JR
UNOPPOSED MOTION FOR SETTING FORTH A PROPOSED FUTURE COURSE OF PROCEEDINGS. PROPOSED
ORDER.

04/13/2007 Party(s): MAINE BUREAU OF INSURANCE, ERIC A. CIOPPA, ROBERT A WAKE
MOTION - DETERMINE COURSE PROCEEDINGS GRANTED ON 04/13/2007
DONALD H MARDEN , JUSTICE
COPIES TO PARTIES/COUNSEL

FOR APRIL 17, 2007 AT 8:30 A.M. IN THE KENNEBEC COUNTY COURTHOUSE IS CANCELLED AS NO

LONGER NECESSARY.

04/17/2007 HEARING - MOTION PRELIMINARY INJUNCTION NOT HELD ON 04/13/2007
DONALD H MARDEN , JUSTICE

04/19/2007 Party(s): BORDERVIEW REHABILITATION & LIVING CENTER,THE CHAPMAN HOUSE,EVERGREEN MANOR NURSING
& REHABILITATION
OTHER FILING - ENTRY OF APPEARANCE FILED ON 04/19/2007
Defendant's Attorney: ROBERT KLINE

04/19/2007 Party(s): BORDERVIEW REHABILITATION & LIVING CENTER
ATTORNEY - RETAINED ENTERED ON 04/19/2007
Attorney: ROBERT KLINE

04/19/2007 Party(s): THE CHAPMAN HOUSE
ATTORNEY - RETAINED ENTERED ON 04/19/2007
Attorney: ROBERT KLINE

04/19/2007 Party(s): EVERGREEN MANOR NURSING & REHABILITATION
ATTORNEY - RETAINED ENTERED ON 04/19/2007
Attorney: ROBERT KLINE

05/09/2007 Party(s): MAINE HEALTH CARE ASSOCIATION WORKERS
OTHER FILING - OTHER DOCUMENT FILED ON 05/09/2007
Plaintiff's Attorney: THOMAS C STURTEVANT JR
CERTIFICATION OF RECORD.

05/14/2007 Party(s): MAINE BUREAU OF INSURANCE, ERIC A. CIOPPA,ROBERT A WAKE
MOTION - OTHER MOTION FILED ON 05/14/2007
Defendant's Attorney: THOMAS C STURTEVANT JR
UNOPPOSED MOTION REGARDING SCOPE OF THE PROCEEDING WITH PROPOSED ORDER.

05/17/2007 Party(s): MAINE BUREAU OF INSURANCE, ERIC A. CIOPPA,ROBERT A WAKE
MOTION - OTHER MOTION GRANTED ON 05/16/2007
DONALD H MARDEN , JUSTICE
UNOPPOSED MOTION REGARDING SCOPE OF THE PROCEEDING WITH PROPOSED ORDER. CT 1 AND CT 3
DISMISSED. CT 2-80C PETITION PENDING.

06/19/2007 Party(s): MAINE HEALTH CARE ASSOCIATION WORKERS
OTHER FILING - TRIAL BRIEF FILED ON 06/18/2007
Plaintiff's Attorney: MICHAEL E SAUCIER
80C BRIEF

07/18/2007 Party(s): BORDERVIEW REHABILITATION & LIVING CENTER,THE CHAPMAN HOUSE,EVERGREEN MANOR NURSING
& REHABILITATION
LETTER - FROM PARTY FILED ON 07/18/2007
PARTIES-IN-INTEREST SUPPORT POSITION OF MAINE BUREAU OF INSURANCE. S/KLINE, ESQ.

07/20/2007 Party(s): MAINE BUREAU OF INSURANCE, ERIC A. CIOPPA,ROBERT A WAKE
OTHER FILING - TRIAL BRIEF FILED ON 07/19/2007
Defendant's Attorney: THOMAS C STURTEVANT JR
RESPONDENT SUPERINTENDENT'S BRIEF IN OPPOSITION TO APPEAL. 80C

08/13/2007 Party(s): MAINE HEALTH CARE ASSOCIATION WORKERS
OTHER FILING - REPLY MEMORANDUM FILED ON 08/06/2007
Plaintiff's Attorney: MICHAEL E SAUCIER
PLAINTIFF'S REPLY BRIEF, FILED.

10/11/2007 HEARING - OTHER HEARING SCHEDULED FOR 11/09/2007 @ 9:30
DONALD H MARDEN , JUSTICE
NOTICE TO PARTIES/COUNSEL

10/11/2007 HEARING - OTHER HEARING NOTICE SENT ON 10/11/2007

11/01/2007 Party(s): MAINE HEALTH CARE ASSOCIATION WORKERS
MOTION - MOTION TO CONTINUE FILED ON 10/30/2007
Plaintiff's Attorney: MICHAEL E SAUCIER
CONSENTED MOTION FOR CONTINUANCE OF NOVEMBER 9, 2007 WITH PROPOSED ORDER.

11/02/2007 Party(s): MAINE HEALTH CARE ASSOCIATION WORKERS
MOTION - MOTION TO CONTINUE GRANTED ON 10/30/2007
DONALD H MARDEN , JUSTICE
COPIES TO PARTIES/COUNSEL

11/02/2007 HEARING - OTHER HEARING CONTINUED ON 11/02/2007

11/08/2007 Party(s): MAINE BUREAU OF INSURANCE, ERIC A. CIOPPA, ROBERT A WAKE
LETTER - FROM PARTY FILED ON 11/08/2007
Defendant's Attorney: THOMAS C STURTEVANT JR
LETTER REGARDING TRIAL MANAGMENT CONFERENCE.

11/19/2007 HEARING - OTHER MOTION SCHEDULED FOR 12/04/2007 @ 2:00
DONALD H MARDEN , JUSTICE
ORAL ARGUMENTS

11/19/2007 HEARING - OTHER MOTION NOTICE SENT ON 11/19/2007
ORAL ARGUMENTS

11/30/2007 Party(s): BORDERVIEW REHABILITATION & LIVING CENTER, THE CHAPMAN HOUSE, EVERGREEN MANOR NURSING
& REHABILITATION
MOTION - MOTION TO CONTINUE FILED ON 11/28/2007
Defendant's Attorney: ROBERT KLINE
WITH PROPOSED ORDER

11/30/2007 Party(s): BORDERVIEW REHABILITATION & LIVING CENTER, THE CHAPMAN HOUSE, EVERGREEN MANOR NURSING
& REHABILITATION
MOTION - MOTION TO CONTINUE GRANTED ON 11/30/2007
COPIES TO PARTIES/COUNSEL

11/30/2007 HEARING - OTHER MOTION CONTINUED ON 11/30/2007
ORAL ARGUMENTS

01/07/2008 HEARING - OTHER MOTION SCHEDULED FOR 01/15/2008 @ 8:30 in Room No. 1
ORAL ARGUMENT

01/07/2008 HEARING - OTHER MOTION NOTICE SENT ON 01/07/2008

ORAL ARGUMENT
ATTYS. OF RECORD.

COPIES TO

01/15/2008 HEARING - OTHER MOTION HELD ON 01/15/2008

JOSEPH M JABAR , JUSTICE

Defendant's Attorney: THOMAS C STURTEVANT JR

Plaintiff's Attorney: MICHAEL E SAUCIER

ORAL ARGUMENT

ALSO PRESENT

ROBERT KLINE. TAPE 762-A INDEX 4690-7060 TAPE 763-A INDEX 002-467

COURT TO TAKE MATTER UNDER ADVISEMENT.

01/17/2008 ORDER - COURT ORDER ENTERED ON 01/16/2008

JOSEPH M JABAR , JUSTICE

FOR THE REASONS STATED ABOVE, THE PETITIONER'S RULE 80C APPEAL IS HEREBY DENIED. THE

SUPERINDENT'S ORDER IS AFFIRMED.

COPIES TO ATTYS./PARTIES

A TRUE COPY

ATTEST: _____

Clerk