

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

In the matter of :  
Proposed Affiliation of :  
BCBSD, Inc. Doing Business as : Docket No. 99-09  
Blue Cross and Blue Shield of :  
Delaware, With CareFirst, Inc. :

**DECISION AND AMENDED ORDER**

In this proceeding, I am asked by Blue Cross and Blue Shield of Delaware, Inc. (“BCBSD”) to review and approve a change in the affiliation status between BCBSD and CareFirst, Inc. (“CareFirst”) (collectively the “Parties”). The Parties have either refused to provide the documents needed to analyze and evaluate the proposed change, or have insisted upon doing so under conditions of secrecy that are contrary to the law of this State. Therefore, I am denying the Parties’ application.

**PROCEDURAL BACKGROUND**

The Parties’ affiliation status and their ongoing relationship have been at issue before the Delaware Insurance Department for over seven years. Within the last three years, BCBSD has sought the Department’s permission to change its structural affiliation with CareFirst to a contractual affiliation, withdrawn that request and sought to terminate its affiliation with CareFirst altogether, withdrawn that request and submitted a second request to change its structural affiliation to a contractual affiliation, withdrawn and then resubmitted its second request for a contractual affiliation, and most recently sent a letter to the Department indicating that it intends to seek yet another type of affiliation, perhaps with a different company altogether, in the near future.

**BCBSD Seeks A Structural Affiliation with CareFirst**

On December 23, 1998, BCBSD and CareFirst executed an affiliation agreement whereby BCBSD would continue to provide health insurance and related services in Delaware as part of the CareFirst organization. In return, CareFirst would become the sole member of BCBSD and BCBSD would give up its Blue Cross® and Blue Shield® primary license (the “Marks”) and operate under an affiliate license through CareFirst. The affiliation agreement was reviewed and approved by the Delaware Insurance Department (the “Department”) in the above-captioned docket pursuant to a March 20, 2000 Final Order and Decision (“Original Order”). The Original Order was subject to certain conditions, which remain in effect to this day.

At the original hearing on the affiliation status of the Parties, BCBSD asserted that such a structural affiliation was essential if BCBSD was to remain competitive in the Delaware marketplace, and that BCBSD was engaged in a “life and death search for a strategic

partner.” (January 4, 2000 PROPOSED FINDINGS, RECOMMENDATIONS AND ORDER at Page 10)(hereinafter “January 4, 2000 PROPOSED FINDINGS”). Furthermore, it was BCBSD’s opinion that the structural affiliation of the Parties would allow BCBSD access to capital for investments in technology and overall would allow BCBSD to achieve “significant economies of scale and lower its administrative costs.” (January 4, 2000 PROPOSED FINDINGS at Page 16). The Parties’ original application to affiliate was not entirely unopposed, and numerous concerned members of the public submitted letters to the Department that focused primarily on the quality of services or products that BCBSD provided. (January 4, 2000 PROPOSED FINDINGS at Page 33). Due in part to the Hearing Officer’s concerns regarding the separate corporate and operating status of BCBSD and to maximize responsiveness to local concerns, several conditions for approval were recommended by the Hearing Officer, whose recommendations were substantially approved by Insurance Commissioner Donna Lee Williams. (January 4, 2000 PROPOSED FINDINGS at Page 37, *et. seq.*).

### **BCBSD Seeks to Change Its Relationship With CareFirst from Structural to Contractual**

In 2003, events occurred which caused BCBSD to seek an alteration of its relationship with CareFirst from a structural affiliation to a contractual relationship.

As a result of the unanimous passage of legislation in 2003 by the Maryland General Assembly, which the Department believed adversely impacted BCBSD and its Delaware subscribers, Commissioner Williams issued a Standstill Order on April 10, 2003. The Standstill Order was quickly followed by a Rule to Show Cause why (1) the effect of the Maryland Legislation would not contravene the Original Order, (2) the Original Order should not be terminated, (3) BCBSD’s participation in the affiliation should not be withdrawn, (4) any assets, licenses, authorities, or the like yielded by BCBSD to CareFirst should not be returned, and (5) any other and necessary Order should not be entered protecting the rights of Delaware citizens to the full benefits offered prior to the Original Order (the “Rule to Show Cause”). In accordance with the Delaware Administrative Procedures Act and the Insurance Code, a hearing on the Rule to Show Cause was held before Commissioner Williams presiding as the Hearing Officer on November 4, 2003.

At the November 4, 2003 hearing, the Parties jointly proposed a modified affiliation agreement between the Parties on the terms and conditions set forth in an Administrative Services and Business Affiliation Agreement (“2003 ASBAA”). The hearing record reflects that the Parties desired to preserve the benefits of their prior Affiliation by replacing the structural corporate relationship with one that was based on a contractual agreement.

In Commissioner Williams’ Order of December 1, 2003, she approved the 2003 ASBAA and the associated transactions on the condition that the closing of the 2003 ASBAA be consummated by December 31, 2003. Although BCBSD and CareFirst agreed that the 2003 ASBAA would not become effective unless approved by the relevant insurance regulatory authorities (*i.e.*, Maryland and the District of Columbia), Commissioner Williams’ Order was not subject to approval by other authorities.

On December 30, 2003, BCBSD notified Commissioner Williams that the Parties would be unable to meet the deadline set by the Order of December 1, 2003. As a result, the Rule to Show Cause was reinstated, a new hearing date was set, and the Parties were ordered to submit memoranda on two issues: (1) whether the Affiliation Order had been violated by the effect of provisions of the Maryland Legislation, and (2) if the Affiliation Order had been violated, the appropriate remedy for any violations. Following the submission of legal memoranda, a hearing was convened on March 9, 2004 to hear evidence on those two issues.

### **BSBSC Seeks to Terminate Its Affiliation with CareFirst**

By the time of the March 9, 2004 hearing—less than five months after BCBSD and CareFirst had presented their affiliation agreement to the Department—BCBSD had decided that it no longer wished to be affiliated with CareFirst. BCBSD Chairman of the Board, Max Bell, testified at the hearing that “the Maryland General Assembly has taken away the company we have become affiliated with and has replaced it with a very different entity.” (June 30, 2004 Decision and Amended Order at Page 4, citing March 9, 2004 Hearing Transcript at Page 87). In addition, Mr. Bell testified that BCBSD saw little prospect that CareFirst would be managed the way it was prior to the enactment of the Maryland Legislation. (March 9, 2004 Hearing Transcript at Pages 87-93). Finally, it was Mr. Bell’s testimony that “[i]f conditions at CareFirst deteriorate, it may be too late to disentangle the management and governance interlocks that bind the companies together before irreparable damage to the reputation and finances of [BCBSD] result.” (March 9, 2004 Hearing Transcript at Pages 92-94).

The Parties were also asked to present evidence regarding the fiscal impact upon BCBSD of a total disaffiliation of BCBSD and CareFirst. Timothy Constantine, BCBSD’s President, testified that even under the most conservative projections, BCBSD was confident that “either limited or total disengagement from CareFirst can be achieved without disruption to or negative impact on our subscribers.” (June 30, 2004 Order at Page 15, *citing*, March 9, 2004 Hearing Transcript at Page 136). Whereas in the original hearing, BCBSD offered testimony that a structural affiliation would allow it to be sustainable in a competitive marketplace and would achieve “significant economies of scale and lower its administrative costs” (January 4, 2000 PROPOSED FINDINGS at Page 16), BCBSD presented evidence in 2004 that BCBSD continued to handle many areas of operation after the affiliation with CareFirst. (June 30, 2004 Order at Page 9 *citing*, March 9, 2004 Hearing Transcript at Pages 136-137). As a result, BCBSD was confident that it could cost effectively resume pre-affiliation functions on behalf of an autonomous BCBSD. (June 30, 2004 Order at Page 9 *citing*, March 9, 2004 Hearing Transcript at Pages 136-139).

On June 30, 2004, Commissioner Williams issued a Decision and Amended Order withdrawing her approval of the Affiliation between BCBSD and CareFirst. In the order, Commissioner Williams concluded that a dramatic change in circumstances had occurred and that a structural affiliation between the Parties was no longer in the best interests of BCBSD or its Delaware subscribers. Among other things, the June 30, 2004 Order prohibited BCBSD’s further participation in the surviving aspects of the original 1998 Business Affiliation Agreement and required CareFirst to take such steps as necessary to surrender its rights to use the Marks as “Primary Licensee” in Delaware, including cooperating with BCBSD, as necessary, to facilitate

BCBSD's attainment of "Primary Licensee" status in Delaware. (June 30, 2004 Order at Page 20).

The June 30, 2004 Order also expressly retained jurisdiction over the Parties for such time as the Parties remained structurally affiliated and required the Parties to submit to the Department for approval all contracts and agreements that the Parties jointly proposed to implement in order to continue any affiliation of the Parties on a non-structural basis. The June 30, 2004 Order was appealed by CareFirst to the Delaware Superior Court, which affirmed the June 30, 2004 Order on October 5, 2004. The Delaware Supreme Court affirmed the Superior Court decision on December 17, 2004. Before both the Superior Court and the Supreme Court, BCBSD supported the Department's disaffiliation Order.

### **BCBSD Withdraws Its Disaffiliation Request and Renews Its Contractual Affiliation Request**

On November 18, 2005, less than a year after the Delaware Supreme Court upheld the Department's Order of disaffiliation, BCBSD formally asked the Department to reopen Docket No. 99-09 in order to obtain the "review and approval of changes in the affiliation status of BCBSD and CareFirst, Inc." BCBSD now wished once again to be affiliated with CareFirst, through the implementation of a new and somewhat different Administrative Services and Business Affiliation Agreement, dated October 21, 2005. ("2005 ASBAA"). (Letter from David S. Swayze, Esq. to the Honorable Matthew Denn, dated November 18, 2005 at Page 1).

The Parties were made aware of my decision to grant the request for review of the 2005 ASBAA via an April 6, 2006 letter from the Department's Special Counsel ("Special Counsel"). The letter informed the Parties that, due to changes in circumstances since the June 30, 2004 Order, including, but not limited to, a significant in-state transaction by BCBSD that has had the apparent effect of reducing its RBC ratio, the completion of an internal analysis by BCBSD of its capital needs, explicit statements by both BCBSD and CareFirst regarding their corporate missions, disclosures concerning certain areas of operating expense, and almost two years of experience of BCBSD working with CareFirst under the new Maryland statutory structure, the application for approval of their affiliation status would include a factual inquiry and expert analysis prior to a public hearing on the Parties' application.

As a result, on May 5, 2006 I issued a Pre-Hearing Order for a hearing on the application for approval of the 2005 ASBAA. At the request of the Parties, the timing of the procedural schedule contained in the May 5, 2006 Pre-Hearing order was expedited. As part of the required factual inquiry, and pursuant to 18 Del. C. §326, separate *Subpoenas Duces Tecum* were served on BCBSD and CareFirst for the production of certain documents relating to the Department's inquiry as to whether the change in the affiliation status of the Parties was in the best interests of BCBSD policyholders or the Delaware insurance-buying public.

The Parties' response to the May 5, 2006 Pre-Hearing Order and subpoenas was to withdraw their request for review and approval of the 2005 ASBAA. The Parties renewed their request for approval of the change in the affiliation status of the Parties on June 19, 2006. On June 26, 2006 I issued a Pre-Hearing Order and concurrently issued separate subpoenas,

which were nearly identical to the May 5, 2006 subpoenas, for the production of certain documents relevant to the Department's inquiry as to whether the change in the affiliation status of the Parties was in the best interests of BCBSD policyholders or the Delaware insurance-buying public. The June 26, 2006 Subpoenas (hereinafter, the "Subpoenas") and Pre-Hearing order gave the parties until July 31, 2006 to comply, and otherwise extended the timeframe by which the Parties' application would be considered.

In addition, the June 26, 2006 Pre-Hearing Order outlined a procedure for the Department to evaluate claims by the Parties that documents were confidential and should not be made available to the public. That procedure was designed to ensure that the Department complied with its responsibility under the Freedom of Information Act for classifying any document as confidential. Mell v. New Castle County, 835 A.2d 141, 145 (Del. Super. 2003).

On July 10, 2006, the Parties requested that the Department refrain from inquiring into certain factual issues in connection with the application. In a letter dated July 13, 2006 from Special Counsel, the Department made clear that it would not limit the scope of the inquiry but that if the Parties had specific concerns about particular document requests contained in the subpoena that the Parties should provide the Department with a specific description of the concern, the basis for the concern, and a reasonable proposal to alleviate the concern. In addition, the Parties were directed that, if they felt a particular request was burdensome, the Parties should provide the Department with some quantification of the burden – such as the estimate of the number of documents falling within the request – and a reasonable proposal for narrowing the request.

On July 31, 2006, the date documents were to be produced pursuant to the Subpoenas, the Parties filed responses to the Subpoenas by making sweeping and often obtuse objections and indicating that the Department would not be permitted to inquire into any factual issues that the Parties deemed inappropriate – including examining any documents or information predating the June 30, 2004 Order.

In their July 31, 2006 response to the Subpoenas, the Parties also refused to submit any documents that they deemed confidential until the Department allowed the Parties to label documents as being presumptively confidential rather than having to justify the basis for keeping those documents secret. In total, the Parties withheld at least 7,650 pages of responsive documents dated after June 30, 2004 that they deemed to be confidential, but refused to follow the confidentiality procedure in my Pre-Hearing Order for any of those documents.

Finally, the Parties objected to providing a list and description of documents that they were withholding under claims of attorney-client (or other) privilege. The Parties asserted that the requirement to prepare a privileged documents log was overbroad and unduly burdensome. The Parties failed to cite a single legal authority for their assertion.

In one final effort to persuade the Parties to comply with their legal obligations, Special Counsel sent the Parties a letter on August 3, 2006, requesting that they produce all documents responsive to the Subpoenas, including all confidential documents pursuant to the procedures outlined in the June 26, 2006 Pre-Hearing Order, by the end of business on August

10, 2006. Again, instead of complying with the subpoenas and producing the documents requested, the Parties responded on August 10, 2006 with letters reiterating their broad objections and concerns and requesting a meeting with the Department to discuss those concerns.

### **DECISION AND ORDER**

As Insurance Commissioner, I have a responsibility to protect the interests of BCBSD policyholders and the insurance buying public at large, and to uphold the laws of this State. The Parties' refusal to provide the documents necessary for me to exercise those responsibilities, their refusal to articulate the reasons for their withholding documents in any fashion capable of legal review, and their insistence that I violate the Freedom of Information Act as a condition to viewing necessary documents, requires that I deny the pending application.

Throughout all of the Department's proceedings involving BCBSD and CareFirst, the Department has applied the standard enumerated at 18 Del. C. §5003 to analyze the propriety of any proposed transaction. That analytical standard was upheld by the Delaware Superior Court in its review of the Department's June 30, 2004 Order. In the Matter of: Proposed Affiliation of BCBSD, Inc., d/b/a Blue Cross Blue Shield of Delaware, with CareFirst, Inc., 2004 WL 2419161 at \* 8 (Del. Super. Oct. 5, 2004). The Section 5003 standard explicitly requires that the Department assess: (a) Whether the Parties would be able to satisfy the requirements for the issuance of a license to write the line or lines of insurance for which it is presently licensed; (b) Whether the effect of the merger would substantially lessen competition in insurance in this State or tend to create a monopoly therein; (c) Whether the financial condition of any acquiring party might jeopardize the financial stability of the insurer, or prejudice the interest of its policyholders; (d) Whether the plans or proposals which the acquiring party has to make any other material change in its business or corporate structure or management, are unfair and unreasonable to policyholders of the insurer and not in the public interest; (e) Whether the competence, experience and integrity of those persons who would control the operation of the insurer are such that it would be in the interest of policyholders of the insurer and of the public to permit the merger or other acquisition of control; and (f) Whether the acquisition is likely to be hazardous or prejudicial to the insurance buying public. 18 Del. C. §5003(d)(1).

In an application before the Department, the burden of proof always rests with the applicant. *See* 29 Del. C. §10125(c) and 18 Del. C. §323(f) ("To the extent that it does not conflict with the provisions of [18 Del. C. Ch. 3], the Administrative Procedures Act, Chapter 101 of Title 29, shall govern all aspects of the Department's administrative proceedings"); *See also, Weinfeld v. Delaware Bd. of Med.*, 1999 WL 743803 (Del. Super. 1999). By virtue of presenting an application to the Department for the review and approval of the proposed change in their affiliation status, BCBSD and CareFirst bear the burden to prove that the proposed change in the affiliation status reflected in the 2005 ASBAA satisfies the §5003 criteria.

Instead of attempting to meet this burden, the parties have consistently refused to comply with the Subpoenas and Pre-Hearing Orders that I have issued. The parties' refusal, and their further refusal to even disclose sufficient information to permit the Department to assess whether any of their sweeping objections have legal merit, has rendered it impossible for the

Department to carry out its legal responsibility carefully to review and assess the proposed transaction.

The only objection that the Parties have clearly articulated is their claim that the Department is prohibited from inquiring into any facts predating the Department's last order involving the Parties as part of its inquiry into the current proposed transaction. That objection, besides being firmly contradicted by case law specifically applicable to this very matter, reflects a crabbed view of the Department's responsibilities in reviewing the pending application.<sup>1</sup> There are a myriad of issues before me: whether the effect of the 2005 ASBAA would substantially lessen competition in insurance in this State or tend to create a monopoly therein; whether the financial condition of CareFirst jeopardizes the financial stability of BCBSD, or prejudices the interest of its policyholders; whether the terms of the 2005 ASBAA are unfair and unreasonable to policyholders of BCBSD and not in the public interest; whether the competence, experience and integrity of those persons who would control BCBSD are such that it would be in the interest of policyholders of the insurer and of the public to approve the 2005 ASBAA; and whether the 2005 ASBAA is likely to be hazardous or prejudicial to the insurance buying public. Even if, as the Parties have repeatedly asserted, the changes to the 2005 ASBAA when compared to the 2003 ASBAA are relatively minor in substance, since the approval of that 2003 ASBAA, there has been i) the passage of almost three years in time, ii) a significant in-state transaction by BCBSD that has had the apparent effect of reducing its RBC ratio, iii) the completion of an analysis of BCBSD's capital needs, iv) explicit statements by both BCBSD and CareFirst regarding their corporate missions, and v) at least two wholesale revisions by BCBSD of the relationship it has sought with CareFirst. The occurrence of these events and changes in circumstances mandate that the Department undertake more than a rubber stamp review of the 2005 ASBAA.

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<sup>1</sup> Judge Slight's concluded that a Delaware administrative agency has the inherent power, even without statutory authority, to reopen and reconsider a decision until it loses jurisdiction. Slight's Opinion, In the Matter of: Proposed Affiliation of BCBSD, Inc., d/b/a Blue Cross Blue Shield of Delaware, with CareFirst, Inc., 2004 WL 2419161 at \* 9 n.51 (citing Henry v. Dept. of Labor, 293 A.2d 578, 581 (Del. Super. 1972)). More generally, the Delaware General Assembly has vested me with broad statutory powers. See 18 Del. C. § 310(b) ("The Commissioner shall have the powers and authority expressly vested by or reasonably implied from this title."); see also 18 Del. C. § 5008 ("The Commissioner may, upon notice and opportunity for all interested parties to be heard, issue such rules, regulations and orders as shall be necessary to carry out the provisions of this chapter."). It is well settled that this broad statutory power carries with it the authority to do all that is reasonably necessary to execute that power. Dep't of Correction v. Worsham, 638 A.2d 1104, 1107 (Del. 1994); Atlantis I Condo. Ass'n v. Bryson, 403 A.2d 711, 713 (Del. 1979). Even without express statutory authority, the Delaware Insurance Commissioner has the inherent power to reopen and reconsider a decision until the Department loses jurisdiction. Henry v. Dept. of Labor, 293 A.2d 578, 581 (Del. Super. 1972).

Furthermore, with no disrespect to the regulatory authority of my predecessor, I am entitled to my own individual assessment of whether the terms and conditions of the proposed contractual affiliation meets the Section 5003 standard, and as noted above, it is the Parties' burden to meet that standard. While the Department's substantive review of the 2005 ASBAA would certainly have focused on more recent facts and circumstances, it is not for the Parties to place an arbitrary and unilateral limit on the scope of the Department's review.

The need for careful review is magnified by the inconsistent positions that the Parties, particularly BCBSD, have taken before the Department in previous proceedings. In 1999, it was BCBSD's position that structural affiliation was in the best interests of BCBSD policyholders because it was critical to BCBSD's very existence. By 2004, BCBSD's position was that the new CareFirst Board would likely take CareFirst in a different direction that might put BCBSD and its subscribers at risk. Two years later, BCBSD sought once again to be formally affiliated with CareFirst—on an expedited basis, no less. BCBSD then withdrew that application, only to renew it some three weeks later. Adding to the confusion, BCBSD recently indicated that it wanted a contractual affiliation with CareFirst only on a temporary basis because it plans to return to the current structural affiliation, or some other affiliation with a larger insurer, in the foreseeable future. (*See*, July 10, 2006 Letter from David S. Swayze, Esq. to Special Counsel). BCBSD's constantly changing perception of CareFirst's overall financial and structural viability is disconcerting and at a minimum merits a thorough review by the Department.

In short, it is my view that the pending application warrants a thorough review of the entire relationship between the Parties. The interests of BCBSD policyholders and the insurance buying public at large, which I am tasked by law to protect, make it not only appropriate but necessary for the Department to conduct a thorough and complete examination.

Finally, that analysis must occur in a manner consistent with this state's open government laws. BCBSD has objected to the conditions I established in my June 26, 2006 Pre-Hearing Order, placing the burden of establishing the need for a document's confidentiality on the party requesting confidential treatment. BCBSD stated that it does not believe there "is any precedent for the burdensome gauntlet the Commissioner would interpose in this proceeding for determining confidentiality or privilege." (August 10, 2006 letter David S. Swayze, Esq. to Special Counsel at Page 3).

While the procedure for determining confidentiality outlined in the June 26, 2006 Pre-Hearing Order was admittedly thorough, there is precedent in other administrative contexts. 7 Del. Code. Regs. §102 at 6.0. More importantly, the standard I set attempts to balance the obligations this Department has to the public and the public interest as a whole with the obligations to insurers being investigated by the Department to keep certain documents confidential. While it may represent a departure from past practice, since my tenure as Commissioner began, this Department has placed an appropriate emphasis on the public's right to examine, comment upon and inspect non-confidential information in the possession of the Department. A unilateral determination by a party in a proceeding before the Department that its

documents are confidential is an insufficient basis upon which to withhold that document from public scrutiny.

My decision in this matter is not, and in fact cannot be, based on the underlying merits of the Parties' application. The Parties have made it impossible for me to render such a decision in a responsible way. The Parties may resubmit the application at a later time if they determine that they are willing to comply with the law. In the interim, the Department will not be bullied into making a decision that has implications for the health care of tens of thousands of Delawareans without adequate information to make that decision in a responsible manner.

Accordingly, and based on all the foregoing, IT IS HEREBY ORDERED THAT:

1. Because the Parties have refused to provide the documents the Department believes are necessary to evaluate whether the proposed change in the affiliation status of the Parties is in the best interests of the BCBSD policyholders and its Delaware subscribers, the Parties have failed to meet their burden of proof on their application. As a result, the Parties' Application to have the Department review and approve the proposed changes in the affiliation status of BCBSD and CareFirst, Inc. is denied.

2. Effective 60 days from the date of this Order or, should a timely Superior Court appeal be filed, immediately following disposition of that appeal by the Superior Court, any stay of the June 30, 2004 Order is rescinded.

3. For such time as the Parties remain structurally affiliated and until any subsequent Order issued in connection with any approval of a future contractual relationship between the Parties, I retain jurisdiction over this matter and the Parties, and all of the conditions set forth in the June 30, 2004 Order, Exhibit B to the original Affiliation Order and of the Standstill Order shall remain in effect until expressly rescinded.

SO ORDERED this 23rd day of August, 2006

  
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MATTHEW DENN  
Insurance Commissioner