

November 3, 2015

Thomas C. Sturtevant, Esq.
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, Maine 04333-006

RE: Progressive's First Objections to the Advocacy Panel's Failure to Respond to
Progressive's Informational Requests/INS- 15-1001

Dear Tom:

Appellants and the Advocacy Panel are unable to resolve several discovery disputes without a ruling from the Superintendent. Progressive sent the Advocacy Panel a letter on Wednesday, October 28 outlining issues with the Panel's objections to Appellant's First Informational Requests. (Progressive's October 28 letter is attached as **Exhibit A**.) The Panel has not replied to this letter. Accordingly, Progressive responds to and asks the Superintendent to rule on the following Advocacy Panel objections:

A. The Advocacy Panel improperly relied on the Mental Process Rule to withhold certain documents which should be part of the administrative record.

The Advocacy Panel seems to have withheld documents as privileged under the mental process rule. It refused to produce at least some documents in response to the following requests under a claim of mental process privilege:

- The Panel produced no documents in response to Request #4 for "documents and notes that Bureau staff reviewed or consulted in relation to the Bureau's decision to disapprove The Rate Filing."
- The Panel produced copies of two internal Bureau e-mails discussing The Rate Filing after it was disapproved, in response to Request #6 for "all communications...related to The Rate Filing."
- The Panel produced no documents in response to Request #8 for "all documents related The Rate Filing which include any discussion or analysis of the Progressive Consent Order."
- The Panel produced no documents in response to Request #9 for "all documents supporting the Bureau's interpretation of 24-A M.R.S. §2916, and in particular

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the Bureau's interpretation of the phrase "the sole reason" contained within this statute, including bulletins, rules, and statutes."

The mental process rule should not apply here for two reasons. First, the rule only protects "the secret mental processes of those who, acting in a judicial or quasi-judicial capacity, make decisions as to facts or as to law." *Di Lapi v. City of New York*, 2012 U.S. Dist. LEXIS 2495, at 6 (E.D.N.Y. Jan. 9, 2012) (citing *Singer Sewing Mach. Co. v. NLRB*, 329 F.2d 200, 206 (4th Cir. 1964)). The Bureau's disapproval of The Rate Filing was not judicial or quasi-judicial, and consisted entirely of "Michael G. Blake...review[ing] the filing and then publish[ing] it to appropriate persons." (Resp. to Inf. Req. No. 7.) Mr. Blake hardly acted in a 'quasi-judicial' capacity while reviewing the filing, and the Bureau's disposition did not involve "the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings" and did not have "a quality resembling that of a judicial proceeding." *Morgan v. United States*, 298 U.S. 468, 480 (1936) (the definition of a quasi-judicial administrative proceeding taken from the seminal case establishing the mental process privilege).

Second, the mental process privilege does not apply where "the record fails to explain adequately the administrative action." See 5-38 Administrative Law § 38.02 ("courts limit judicial review of the decision-making process [except] if the record fails to explain adequately the administrative action"). The only staff comment contained within the disapproval is a bare recitation of 24-A M.R.S. §2916: "The proposed factors for drivers over the age of 65 appearing in Exhibit 1C are in violation of Maine statute's 24-A, Section 2916, which states that rates for personal auto may not increase for the sole reason that the person insured has reached a certain age." The record does not explain how or why the Bureau concluded that The Rate Filing violates this statute, or how the Bureau interpreted and applied this statute to The Rate Filing.¹ In short, even if Mr. Blake and other Bureau officials did act in a quasi-judicial capacity to disapprove The Rate Filing, the record does not contain any of the fact-finding and taking and weighing of evidence which, by definition, they must have conducted in their-quasi-judicial role. At a minimum, the Advocacy Panel should produce documents and materials related to the Bureau's fact-finding and taking and weighing of evidence which led to The Rate Filing disapproval.

B. The Bureau's application of 24-A M.R.S. §2916 to other rate filings is relevant, and certain related documents should be produced accordingly.

The Advocacy Panel refused to provide non-confidential Bureau documents and information related to certain requested categories of approved Filings. One of the key issues in this appeal is whether the Bureau correctly interpreted and applied §2916. This determination is only possible if it is, in fact, known how the Bureau interpreted and applied the statute. This is

¹ On several occasions the Advocacy Panel has cited Bureau of Insurance Bulletin #334 to explain its interpretation and application of 24-A M.R.S. §2916, but this Bulletin does not demonstrate how the Bureau interpreted and applied the statute to The Rate Filing, especially in light of the Bureau's inconsistent interpretation and application of the statute from filing to filing.

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not clear from the record, and is not informed by the Bureau's bare recitation of Bureau of Insurance Bulletin #334. Accordingly, the Bureau's application of §2916 to other Filings is highly relevant to this appeal.

The Bureau's interpretation and application of §2916 to other Filings is particularly important here where it appears that the Bureau has approved other carrier's Filings in a manner inconsistent with its disapproval of The Rate Filing. In particular, we understand that the Bureau recently, after disapproving a Progressive filing, withdrew its approval (or pending approval) of a different carrier's substantially similar filing without further comment. The Bureau's inconsistent application of its own standards is highly relevant to this proceeding, and Progressive must be given the opportunity to determine whether the Bureau's treatment of The Rate Filing is consistent with the Bureau's treatment of other Filings. *See* 24-A M.R.S. §2306 (limiting the Superintendent's ability to disapprove a rate filing by one insurer "if such rate is one used by any other insurer").

In the interests of efficiency, Appellants have narrowed Informational Requests 11, 13-16, 19 and 21 to apply only to approved Filings (as that term is used in Appellants' Informational Requests) submitted on or after January 1, 2013 by one of the top 24 Insurance Groups writing private passenger automobile insurance in Maine on the basis of market share by direct written premium, using 2014 data.² The Advocacy Panel should be required to respond to these requests, especially as so narrowed.

C. The Advocacy Panel improperly withheld certain categories of documents.

The Advocacy Panel's responses to Request 27 identify three categories of withheld documents which are directly responsive to Progressive's Informational Requests and should have been produced.

1. The Advocacy Panel withheld "October 2009 e-mail communications between and among Frank Kimball, Benjamin Yardley, Eric Cioppa, Michelle van Haagen, Timothy Schott, Thomas Record, Arthur Hosford, Robert Wake, Pamela Stutch, and the National Association of Insurance Commissioners concerning age rating" on the grounds that these e-mails "are confidential under 24-A M.R.S. §216(5)."

Documents are only confidential pursuant to 24-A M.R.S. §216(5) if they are (1) "received from the National Association of Insurance Commissioners or International Association of Insurance Supervisors, public officials of other jurisdictions and members of supervisory colleges in which the superintendent participates pursuant to

² Those carriers are: State Farm Group, Progressive Group, Liberty Mutual Group, Geico, Allstate Insurance Group, Concord Group, United Serv. Automobile Assn Group, Metropolitan Group, Quincy Mutual Group, Travelers Group, The Hanover Ins. Group, MMG Insurance Company, Auto Club Enterprises Insurance Group, Frankenmuth Mutual Group, Amtrust Group, Sentry Insurance Group, Hartford Fire and Casualty Group, Horace Mann Group, Farmers Insurance Group, Vermont Mutual Group, Amica Mutual Group, Main Street Amer. Group, Nationwide Corporation Group, & Union Mutual Fire Ins. Group.

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section 222, subsection 7-B, agencies of the Federal Government or political subdivision or other agencies of this State” and (2) “provided to the superintendent with notice that [they are] confidential under the laws of the jurisdiction that is the source of the document or information.” Any e-mails sent, rather than received, by Bureau staff are not confidential under this rule and must be produced. Likewise, the Advocacy Panel must produce any e-mails received by Bureau staff without notice of their confidentiality under the laws of another jurisdiction.

2. The Advocacy Panel withheld “[e]-mail communications from July 30 to August 3, 2015 between and among Thomas Record, Frank Kimball, Timothy Schott, Benjamin Yardley, Robert Wake, and Eric Cioppa concerning several issues related to the Appellants’ request for a hearing.”

These e-mails should be produced because the Advocacy Panel has not identified any grounds for withholding them, and they do not appear to be either privileged or confidential.

3. The Advocacy Panel withheld “[e]-mail communications in September 1 and 2, 2015 between Benjamin Yardley and the NAIC concerning other states’ laws on age rating.” Again, these e-mails should be produced. The Panel has not identified any grounds for their withholding and they should be produced.

Because these items do not appear to be privileged or otherwise confidential, and they are directly responsive to Progressive’s Informational Requests, they should be produced.

D. A more detailed privilege log is necessary.

The Advocacy Panel’s responses contain numerous apparent claims of privilege or confidentiality in response to virtually every Request for Information. The Panel’s responses also identify certain categories of documents which it possesses but does not plan to produce, without identifying any particular privilege. Progressive cannot assess if documents are being properly withheld without more information. The Advocacy Panel should produce in response to the above concerns in particular a detailed privilege log noting the category of document, its date, its author, any recipients, and the respective claim of privilege or confidentiality protecting that document.

Sincerely,



Matthew S. Warner

MSW:smw

cc: James M. Bowie, Esq.



October 27, 2015

BY ELECTRONIC MAIL

James M. Bowie, Esq.
Assistant Attorney General
6 State House Station, Augusta, ME 04333

**RE: Advocacy Panel Objections & Responses to Informational Requests
INS-15-1001**

Dear Jim:

Progressive has gone to great lengths in an effort to understand the Bureau of Insurance's interpretation and application of 24-A M.R.S. §2916. Prior to submitting the rate filings that are the subject of this appeal (the "Rate Filing"), my client sent the Bureau information concerning the Rate Filing and the multiple reasons the Rate Filing complied with 24-A M.R.S. §2916. Progressive met and communicated with Bureau staff at length over a span of several months, but never received a cogent response outlining the Bureau's interpretation or intended application of the statute. Progressive then, after failing to receive a concrete Bureau response, submitted the Rate Filing which on its face employs multiple variables to establish rates for any given insured. The Rate Filing rate factors increase or decrease based on the increase or decrease in expected losses, a product of complex actuarial calculations involving numerous factors and expansive underlying data.

The Bureau appears to have summarily disapproved the Rate Filing as violating §2916 without conducting any concrete analysis or calculations of its own (if this is not the case, then as discussed below any Bureau analysis is discoverable and should be provided pursuant to Progressive's Informational Requests). This is concerning in itself, but even more so in light of the fact that the Bureau's apparent interpretation of §2916 vis-à-vis the Progressive Rate Filing is at odds with Bureau treatment of other recent filings. The Bureau has not only denied the Rate Filing on grounds that are inapposite to the Bureau's treatment of other filings, but has also approved other company's Rate Filings which would on their face be a violation of the Progressive Consent Order.

In short, my clients have been concerned since the start of this process in 2009 that the Bureau did not have a concrete and consistent interpretation of §2916 and how the statute should be applied to Filings. Since February 2015 Progressive has attempted to engage and work with the Bureau to resolve these concerns as related to the Rate Filing, but unfortunately the Bureau declined to provide any additional insights. Now, your responses to Progressive's Informational Requests have confirmed our fears that the Bureau has yet to form a definable, consistent, and

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correct understanding of §2916 and, in particular, the meaning of the phrase “sole reason” in that statute.

The Advocacy Panel’s responses (and document production) are conspicuously void of any analysis of the Filing, any explanation of how the Bureau applied §2916 to the Filing, or any indication of how the Bureau applies §2916 generally. Instead, your responses are replete with objections, claims to privilege, and circular referrals to the text of §2916 and Bulletin 334, suggesting one of two conclusions: either the Bureau summarily disapproved the Rate Filing and no analysis exists, or the Bureau did conduct its own analysis of the Rate Filing but is refusing to provide documents relevant to this analysis.

In a continuing effort to tease out the Bureau’s interpretation of §2916 and its application of this statute to the Rate Filing, I identify the key¹ issues raised by the Advocacy Panel’s responses and objections:

1. You have improperly withheld documents under a claim of mental process.

It is improper to refuse to provide documents on the basis that those documents may provide insight into the mental processes of administrative decision-makers. The mental process rule is reserved for “the secret mental processes of those who, acting in a judicial or quasi-judicial capacity, make decisions as to facts or as to law.” *Singer Sewing Machine Co. v. NLRB*, 329 F.2d 200, 206 (4th Cir. 1964).

The Bureau’s disposition of the Rate Filing to date was neither judicial nor quasi-judicial. According to the Advocacy Panel, it consisted entirely of “Michael G. Blake, Bureau of Insurance Property and Casualty Actuary review[ing] the filing and then publish[ing] it to appropriate persons.” (Response to Informational Request No. 7.) Mr. Blake hardly acted in a ‘quasi-judicial’ capacity while reviewing the filing, and the Bureau’s disposition did not involve “the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings” and did not have “a quality resembling that of a judicial proceeding.” *Morgan v. United States*, 298 U.S. 468, 480 (1936) (defining a quasi-judicial administrative proceeding).

Because Mr. Blake and his Bureau colleagues were not administrative decision-makers protected by the mental process rule, any documents related to their analysis of the Rate Filing should be produced. This is especially true here where the disapproval of the Rate Filing is

¹ There are other issues largely unaddressed in the body of this correspondence raised by the Panel’s objections in particular. To refuse to adopt definitions, for example, provided in discovery requests is unorthodox and self-defeating to the extent the Panel is concerned with scope; definitions, by definition, narrow the scope of any request. As another example, the Panel seems to disclaim any obligation to respond to Progressive’s Informational Requests. If accurate, this position would render the procedure and deadlines established by the Hearing Panel on September 28, 2015 entirely without purpose or effect. We find a number of your Panel’s other responses and objections problematic as well but have chosen, for now, to focus on the key issues raised by the Panel’s objections and responses.

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justified solely by a bare recitation of §2916² and “the record fails to explain adequately the administrative action.” See 5-38 Administrative Law § 38.02 (“courts limit judicial review of the decision-making process [except] if the record fails to explain adequately the administrative action”).

2. The Bureau’s application of §2916 to other rate filings is relevant and certain requested documents should be produced accordingly.

One of the key issues in this appeal is whether the Bureau correctly interpreted and applied §2916. This determination is only possible if it is, in fact, known how the Bureau interpreted and applied the statute. This is not clear from the record. Accordingly, the Bureau’s application of §2916 to other Filings is highly relevant to this appeal.

In the interests of efficiency and in an effort to lessen the burden on the Advocacy Panel, my client further narrows its Informational Requests 11, 13-16, 19 and 21 to apply only to approved Filings (as that term is used in Appellants’ Informational Requests) submitted on or after January 1, 2013 by one of the top 24 Insurance Groups writing private passenger automobile insurance in Maine on the basis of market share by direct written premium, using 2014 data.³ This provides a limited universe of possibly responsive Filings, further easing the burden on the Advocacy Panel while allowing Progressive to ascertain how the Bureau has traditionally applied §2916 to Filings.

3. The Hearing Panel improperly withheld certain categories of documents.

Your response to Request 27 identifies three categories of documents which appear to be improperly withheld.

First, the October 2009 e-mail communications identified in the first paragraph are only confidential to the extent they are (1) “received from the National Association of Insurance Commissioners or International Association of Insurance Supervisors, public officials of other jurisdictions and members of supervisory colleges in which the superintendent participates pursuant to section 222, subsection 7-B, agencies of the Federal Government or political subdivision or other agencies of this State” and (2) “provided to the superintendent with notice that [they are] confidential under the laws of the jurisdiction that is the source of the document or information.” Any e-mails sent, rather than received; by Bureau staff are not confidential under this rule and must be produced. Likewise, any e-mails received by Bureau staff without notice of their confidentiality under the laws of another jurisdiction are not confidential and must be produced.

² The only staff comment contained within the disapproval states: “The proposed factors for drivers over the age of 65 appearing in Exhibit 1C are in violation of Maine statute’s 24-A, Section 2916, which states that rates for personal auto may not increase for the sole reason that the person insured has reached a certain age.”

³ I will gladly provide the list of the top 24 carriers to your office to ease any burden identifying these carriers may create.

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Second, the July 30 to August 3 e-mails between the Advocacy and Hearing Panels concerning this hearing cannot be withheld unless there are independent privilege grounds. You have not identified any basis for this withholding, and so these documents should be produced.

Third, you have not identified any basis for withholding the September 1 and 2, 2015 e-mail communications between Benjamin Yardley and the NAIC concerning other states' laws on age rating. Please produce these e-mails as well.

4. A more detailed privilege log is necessary.

The Advocacy Panel's responses contain numerous apparent claims of privilege or confidentiality in response to virtually every Request for Information. The Panel's responses also identify certain categories of documents which it possesses but does not plan to produce, without identifying any particular privilege. Progressive cannot assess if documents are being properly withheld without more information. For any documents you do not plan to produce in response to the above concerns in particular please provide a detailed privilege log noting the category of document, its date, its author, any recipients, and the respective claim of privilege or confidentiality protecting that document.

Progressive is required to ask the Hearing Panel to resolve any outstanding discovery disputes related to Progressive's First Requests for Information by November 3, 2015. Accordingly, I would appreciate your responses to the items in this communication by October 30 at the latest.

Sincerely,



Matthew S. Warner

MSW:smw