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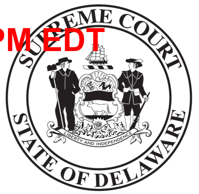

IN THE

Supreme Court of the State of Delaware

SECRETARY CLAIRE DEMATTEIS, in her official capacity as Secretary of the Delaware Department of Human Resources and Co-Chair of the State Employee Benefits Committee; DIRECTOR CERRON CADE, in his official capacity as Director of the Delaware Office of Management and Budget and Co-Chair of the State Employee Benefits Committee; DELAWARE DEPARTMENT OF HUMAN RESOURCES; DELAWARE STATE EMPLOYEE BENEFITS COMMITTEE; and DELAWARE DIVISION OF STATEWIDE BENEFITS,
Defendants-Below, Appellants,

v.

RISEDELAWARE INC., a Delaware corporation; KAREN PETERSON, an individual; and THOMAS PENOZA, an individual,
Plaintiffs-Below, Appellees.

NO. 178, 2023
On Appeal from the Superior Court for the State of Delaware,
C.A. No. N22C-09-526-CLS

CORRECTED APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDINGS

This is an appeal from the Superior Court of the State of Delaware's decision (1) granting Plaintiffs' Motion to Stay the implementation of a Medicare Advantage Plan for State retirees; (2) requiring the State to keep State retirees' Medicare Supplement Plan in full force and effect; and (3) finding that actions of the State Employee Benefits Committee ("SEBC") were subject to the requirements of the Administrative Procedures Act ("APA") found in 29 *Del. C.* § 10101 *et seq*.

This litigation commenced on September 25, 2022, when Plaintiffs filed a complaint (the "Complaint") for declaratory relief pursuant to 10 *Del. C.* § 6501 and 29 *Del. C.* § 10141, and for stay of implementation of a Medicare Advantage Plan for State retirees by the State. Simultaneously, Plaintiffs filed a Motion for Expedited Proceedings.

On October 4, 2022, Plaintiffs filed a Motion to Stay (the "Stay Motion") the implementation of Medicare Advantage. Defendants responded with their answering brief on October 11, 2022, and Plaintiffs filed their reply brief on October 13, 2022.

The Court heard oral argument on the Stay Motion on October 17, 2022. On the same day, Defendants filed their Motion to Dismiss for Failure to State a Claim. The Plaintiffs never responded, and the Court never heard this motion. Two days later, on October 19, 2022, the Court rendered a written decision to stay the

implementation of Medicare Advantage (the decision hereinafter cited as "Stay Order"). The Stay Order required Defendants to retain the then-current health care insurance benefits for all enrolled State retirees.

Following receipt of the Stay Order, on November 9, 2022, one day prior to Defendants' filing their answer to the Complaint, Plaintiffs filed a Motion for Summary Judgment on certain remaining issues (the "Communications Claim"). Defendants filed a cross Motion for Summary Judgment and response in opposition to Plaintiffs' motion on November 14, 2022, arguing, in part, that the Communications Claim had been mooted by the Court's earlier decision.

On the same day, Plaintiffs filed a Motion titled "Plaintiff's Petition for Attorney's Fees" accompanied by an opening brief (the "Attorneys' Fees Claim"). The Court, *sua sponte*, requested via email that the parties provide a status update and include in their response a brief statement of their theory that attorneys' fees were, or were not, allowable in this matter. Both parties responded, and Defendants filed their brief in opposition to the Attorneys' Fees Claim on November 22, 2022.

On November 18, 2022, after a meet-and-confer on the Communications Claim, the parties stipulated to the Court in a joint filing that the Communications Claim was moot and asked the Court to dismiss the claim without prejudice. The Court ordered the dismissal of the Communications Claim on December 6, 2022 - but not before Plaintiffs filed yet another motion.

Plaintiffs filed their fifth motion - a Motion to Amend their Complaint - on December 2, 2022. Defendants filed their response in opposition on December 7, 2022. On December 19, 2022, the Court found that the case ended after the Court's October 19, 2022 Stay Order and that there was no need to amend the Complaint. Accordingly, the Court declared the Motion to Amend moot.

The Court ruled on Plaintiffs' Petition for Attorneys' Fees on February 8, 2023 (A344), denied the request, and stated that no further order was necessary to close the case. On February 15, 2023, Defendants filed an appeal of the Stay Order with this Court. Following submission of papers on a Rule to Show Cause, on April 3, 2023, this Court dismissed the appeal as interlocutory pursuant to Supreme Court Rule 29(b). On April 21, 2023, Defendants filed a Motion for Entry of Final Judgment or in the Alternative, Partial Final Judgment Pursuant to Superior Court Rule 54(b) in the Superior Court. The Superior Court heard argument on the Motion on May 16, 2023, and issued the "Court's Order on Final Judgment" on May 22, 2023. Defendants filed their notice of appeal with this Court on the same day. This is Defendants' opening brief on appeal.[1]

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[1] The Superior Court Order being appealed, in addition to the Final Order of the Superior Court, are attached hereto as Exhibits A and B respectively.

SUMMARY OF ARGUMENT

1. The Superior Court's finding in the Stay Order that the SEBC's approval of a health insurance plan change is regulation-making activity subject to the Administrative Procedures Act ("APA") (*see* A097) should be reversed. The Superior Court erred because, pursuant to 29 *Del. C.* §§ 5201(3) and 9602(b), the SEBC is expressly authorized to select a health insurance carrier for pensioners within the limitations set by 29 *Del. C.* § 5203(b). Because this is an explicit grant of statutory authority, the SEBC was not required to act via promulgation of a regulation under *Free-Flow Packaging Int'l, Inc. v. Sec'y of Dep't of Nat. Res. & Env't Control of State*.[2] As the SEBC was not required to act via promulgation of a regulation when selecting a health insurance carrier for retirees, the requirements of the APA are not applicable to the SEBC's decision. Thus, the APA is inapplicable, and the Superior Court's issuance of a stay of the health insurance carrier decision pursuant to the APA was in error and should be reversed.

[2] 861 A.2d 1233 (Del. 2004) (hereafter "*Free-Flow*").

STATEMENT OF FACTS

A. The SEBC

The SEBC was established in 1999 for the purpose of implementing, overseeing and managing employee benefits.[3] At the time of the actions at issue here, the members of the SEBC were the Lieutenant Governor, the Insurance Commissioner, the Chief Justice of the Supreme Court, the State Treasurer, the Director of the Office of Management and Budget, the Controller General, the Secretary of the Department of Human Resources, and the Secretary of Health and Social Services, or their designees and one additional member appointed by the Governor.[4] The powers and duties of the SEBC are codified in 29 *Del. C.* § 9602(b) and 29 *Del. C.* § 5210(1-5). They include, among other things, the selection of carriers and/or third-party administrators to provide benefits coverage to State employees and the authority to enter contracts for that purpose.[5]

When selecting benefits coverage, the SEBC must select a "plan which is supplemental to Medicare parts A and B, or constructed as a plan under Medicare part C, for eligible pensioners . . . . "[6] For the year 2022, and a number of prior years, the State pensioners health insurance plan has been a Medicare part A and B

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3 *See* 72 Del. Laws, c. 204, § 1.

4 29 *Del. C.* § 9602(a)

5 29 *Del. C.* §§ 9602(b)(2) & (b)(5); 29 *Del. C.* § 5210(3) & (5).

6 29 *Del. C.* § 5203(b).

supplemental plan titled Highmark BCBS Special Medicfill Supplemental Plan ("Medicfill").[7] A027; A067. In February of 2022, the SEBC unanimously approved a motion to move the pensioners' plan to a custom-designed Group Medicare Advantage Plan. A234.

B. The State's Need to Control Health Care Costs

Unlike pension benefits, which are funded via the State Pension Fund established under 29 *Del. C.* § 5541, retiree health care costs are an unfunded liability. The Retirement Benefits Study Committee was re-established by Governor John Carney under Executive Order #34. After a series of public meetings in 2019 – 2021, the Committee ascertained that the state's unfunded liability for retiree health care costs is $10 billion, and will grow to an estimated $31.3 billion by 2050 if no action is taken by the SEBC and General Assembly. A026 n.3. Due to rising health care costs in recent years, including insurance premiums, the cost of Medicfill is not sustainable over the long term. Employees and pensioners are at risk of losing some or all of their benefits package if changes are not implemented. A025; A065. To mitigate these risks, in 2021-2022, the SEBC voted to implement an 8.7% premium increase for non-Medicare plans beginning in fiscal year 2023. A026; A065-066. The SEBC also continued to review options for changes to Medicare

[7] "Medicfill" is a registered trademark of Highmark Blue Cross Blue Shield Delaware.

plans that would provide pensioners with high quality, affordable health care while also addressing the expected Healthcare Trust Fund deficit and the unfunded liability for retiree health care. A026; A066.

In an effort to find a path forward, the SEBC worked with the Retirement Benefit Study Committee to find ways to reduce costs. A025; A065. This included posting and requesting proposals from any interested Medicare plan administrator for comparison and consideration by the SEBC. A136-172.

C. The SEBC Issues Requests for Proposals

On April 26, 2021, the SEBC posted a Request for Proposals ("RFP"), amended on May 18, 2021, which required responses by June 25, 2021. *Id*. The RFP was posted on the State of Delaware Procurement Website (*Id*.) and advertised on the May 10, 2021 SEBC agenda as a discussion item. A174.

The RFP specifically requested one bid for medical plans for active employees and a second bid for Medicare pensioners. A139. Regarding Medicare, the RFP stated that vendors may bid on "[t]he Medicare Supplement plan offered by the State today" and/or "[a] fully-insured group Medicare Advantage plan (which is not offered by the State today) both with and without Medicare Part D prescription drug coverage." *Id*.

D. The SEBC's Public Meeting Notices and the Decision to Move to Medicare Advantage

Initial discussions of the RFP by the SEBC during a public meeting occurred on May 10, 2021, which was noticed on the relevant agenda as "Medical Third-Party Administration (TPA) Services Request for Proposal Overview." A174. Following receipt of the various proposals, further discussion occurred at public meetings on November 8, 2021 and December 13, 2021, each of which were properly placed on the publicly noticed agenda as "Health Third Party Administration RFP Contract Award Recommendation." A175-176. Additionally, a Proposal Review Committee ("PRC") was formed to study the proposals and make recommendations to the SEBC.

During its December 13, 2021 meeting, the SEBC voted to award the Medical Third Party Administrator contract (the "Commercial Contract") for active state employees, to Highmark and Aetna, effective July 1, 2022. A128. Based upon the recommendation of the PRC, the SEBC did not make a decision regarding the Medicare plan that evening. The PRC advised the SEBC that it should, however, make a decision by March 31, 2022, in order to implement the chosen plan by January 1, 2023. A179.

With the March deadline approaching, and at least seven days prior to the February 28, 2022 meeting, the SEBC posted its agenda including notice that, "2021

Health Third Party Administrative Services RFP Award Recommendations… (c.) Medicare Plan Effective January 1, 2021," would be discussed.[8] A192.

Along with the posted agenda, the State posted a document titled "FY23 Outstanding Decisions." A194-225. The content page lists the first section as, "2021 Third Party Administrative Service RFP Award Recommendations." A196. This is nearly identical to the language found on the posted agenda. A192.

The document includes charts that compare Medicare Supplement to Medicare Advantage, compare Medicfill to Medicare Advantage under both Aetna and Highmark, and includes a discussion of considerations when deciding between the options. A199-202.

During the meeting, the SEBC discussed the options, opened the floor for public comment, and voted to award the pensioners contract to Highmark for its Group Medicare Advantage plan (for medical only), effective January 1, 2023. A111; A129; A234-235. On March 2, 2022, the SEBC sent Highmark a contract award letter notifying Highmark that the SEBC had voted in favor of its Medicare Advantage plan. A111; A226-237. The process all occurred in public. A111.

[8] The plan would be effective January 1, 2023, and references to "January 1, 2021" in the agenda were the result of a typographical error. A110; A129.

E. The Medicare Advantage Plan

The Medicare Advantage plan provides many benefits to state pensioners. Under this plan, those retirees/pensioners who are required to pay a portion of their monthly premium would experience a reduction in their monthly cost. A132. This reduction would come with the same benefits coverage—even if some would require prior authorization—and the same no-out-of-pocket costs and prescription drug coverage. *Id*.

F. The SEBC Notifies and Educates State Pensioners About the Medicare Advantage Plan

Medicare Advantage was introduced to pensioners on June 1, 2022. A086; A130-131. Normally, the Statewide Benefits Office ("SBO") would have sent its first communication regarding a plan change that would become effective on January 1 in September of the year prior to the change. A086; A132. Here, however, the SBO specifically sent notice earlier than it normally would have so that pensioners had time to understand relevant changes with Medicare Advantage. A087.

Following its communication on June 1, 2022, the SBO sent five additional letters—including several brochures, answers to frequently asked questions, and newsletters—and held thirty informational sessions where pensioners could get more information and ask questions. *Id*.; A131-132.

In addition to eighteen Medicare Advantage educational sessions held across three counties in August, information about the change was also provided via town hall meetings. The SBO, Office of Pensions, and Highmark attended six town hall style meetings on 9/12, 9/15, 9/22, 9/27, 9/28 (all prior to open enrollment), and 10/10/22 (during open enrollment). *Id.* Each session included a PowerPoint presentation and an opportunity to ask questions. Each of the PowerPoint presentations informed pensioners that the new plan would be the Medicare Advantage Plan and provided information regarding plan changes. *Id.*

Concurrently, negotiations of the exact terms of the Medicare Advantage contract continued in due course and the contract was finalized on September 28, 2022. A086; A130. A copy of the contract was posted on SEBC's website the following day. A088; A330. Open enrollment was scheduled to begin on October 3, 2022. A034; A082.

G. The Superior Court Proceedings

Plaintiffs filed suit in the Superior Court on September 25, 2022 protesting, *inter alia*, the inclusion of a prior authorization component in the Medicare Advantage Plan selected by the SEBC. Strikingly, Plaintiffs contended that the SEBC was required to award the Medicare Advantage Plan to Highmark through the procedures required for adoption of a regulation under the APA—even though the SEBC has the express statutory authority to select "all carriers or third-party

administrators necessary to provide coverages to State employees."[9] Plaintiffs used 7 of 38 pages in the Complaint to make incorrect (and inflammatory) allegations, focused on the preauthorization requirements of Medicare Advantage. Notably, health care plans for active employees and non-Medicare (pre-65) pensioners have included such preauthorization requirements since at least 2010 (*see* A025; A066), and preauthorization has been the industry standard for health care since that time. Plaintiffs sought a stay regarding implementation of the Medicare Advantage Plan pursuant to Section 10144 of the APA.

Following briefing, on October 19, 2022, the Superior Court issued its decision granting the requested stay. In so deciding, the Court stated, even in light of the plain language of 29 *Del. C.* § 9602(b)(2), that "there is no specific statutory directive for [the] SEBC to force all retirees from their State-subsidized benefits to a Medicare Advantage plan or lose benefits" and held "*Free-Flow* does not apply." A097. The Court entered an order prohibiting Defendants from implementing the Medicare Advantage plan "until further Order by this Court" and requiring the State to ensure coverage under the Medicfill plan, the plan in effect prior to October 3, 2022, to "remain in full force and effect." A101. The Court denied Appellees' Motion to Amend the Complaint on December 19, 2022. The Court denied Plaintiffs' Motion for Attorneys' Fees, and entered an order on February 8, 2023.

[9] 29 *Del. C.* § 9602(b)(2).

On February 15, 2023, Appellants filed their Notice of Appeal, but the appeal was dismissed as interlocutory. On April 21, 2023, Defendants filed a Motion for Entry of Final Judgment or in the Alternative, Partial Final Judgment Pursuant to Superior Court Rule 54(b) in the Superior Court. The Superior Court heard argument on the Motion on May 16, 2023 and issued the "Court's Order on Final Judgment" on May 22, 2023. Defendants filed their notice of appeal with this Court on the same day.

ARGUMENT

I. THE SEBC WAS NOT REQUIRED TO PROMULGATE A REGULATION WHEN IT ENTERED INTO A CONTRACT FOR THE ADMINISTRATION OF HEALTH CARE BENEFITS FOR STATE PENSIONERS

A. Question Presented

Did the Superior Court err in finding - contrary to 29 *Del. C.* § 9602(b)(2), 29 *Del. C.* § 5210(3), and *Free-Flow* - that the SEBC was required to adopt Medicare Advantage by promulgating a regulation in conformance and compliance with the APA? This argument was raised below at Dkt. No. 33, Defendants' Motion to Dismiss (A057-062) and at Dkt. No. 30, Defendants' Answering Brief in Opposition to Plaintiffs' Stay Motion. A041-42.

B. Standard and Scope of Review

Interpretation of the requirements of 29 *Del. C.* § 9602(b)(2), 29 *Del. C.* § 5210(3), the APA, and *Free Flow* are questions of law that are reviewed *de novo*.[10]

C. Merits

1. The SEBC Was Not Required to Follow the APA Because It Implemented a Specific Statutory Directive.

In *Free-Flow*, this Court "disagree[d] with the premise that all of what an agency does must culminate in a regulation or a case decision."[11] This Court held

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[10] *City of Wilmington v. Nationwide Ins. Co.,* 154 A.3d 1124, 1127 (Del. 2017) ("Questions of law, including the interpretation of statutes, are [] reviewed *de novo*.").

[11] 861 A.2d at 1236.

that "when an agency carries out other functions [beyond creating a regulation or case decision], as when it implements a specific and detailed statutory directive, it may operate outside the scope of the APA."[12]

Here, the Court is tasked with deciding whether Sections 9602(b) and 5210(3), separately or together, constitute "a specific and detailed statutory directive" for purposes of the SEBC's adoption of health care plans for state employees and pensioners. The powers, duties, and functions of the SEBC are set forth in two sections of the Delaware Code. 29 *Del. C.* § 9602(b) states as follows:

> The State Employee Benefits Committee shall have the following powers, duties and functions:
>
> (1) With the exception of deferred compensation pursuant to Chapter 60A of this title, and any other investment or retirement savings plan, control and management of all employee benefit coverages including health-care insurance and blood bank, pursuant to Chapters 51 and 52 of this title; state employees group life insurance pursuant to Chapter 32 of Title 18; and all other currently existing and future employee benefits coverages, including but not limited to all forms of flexible benefits, dental, vision, prescription, long-term care and disability coverages.
>
> (2) Selection of all carriers or third-party administrators necessary to provide coverages to State employees.
>
> (3) Authority to contract on an insured or self-insured basis.
>
> (4) Authority to adopt rules and regulations for the general administration of the employee benefit coverages.

12 *Id.*

(5) Authority to make and enter into any and all contracts with any agency of the State, or any outside agency, for the purpose of assisting in the general administration of this section.

The statutory authority of the SEBC is further outlined in Title 29, Chapter 52, entitled "Health Care Insurance." Section 5210(3) expressly establishes as a power, function, and duty of the SEBC the "[s]election of the carriers or third-party administrators deemed to offer the best plan to satisfy the interests of the State and its employees and pensioners in carrying out the intent of this chapter."[13]

Aside from the General Assembly itself, only the SEBC has the right and responsibility to decide, consistent with parameters set in Section 5203, the best health care plan to satisfy the interests of the State. It follows that when the SEBC makes a decision regarding selection of a carrier "deemed to offer the best plan to satisfy the interests of the state," it implements a specific and detailed statutory directive provided by the General Assembly.[14] Thus, under *Free-Flow*, the SEBC need not follow the APA in selecting coverages and carriers—such as selecting Highmark for the Medicare Advantage plan.

The Superior Court found *Free-Flow* inapplicable, and that the SEBC's contract award had to be promulgated by regulation because, in the Superior Court's

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[13] The types of plans that the SEBC may select are established by the General Assembly- "Medicare parts A and B, or constructed as a plan under Medicare part C, for eligible pensioners entitled to services, rights or benefits under the federal Medicare Program." 29 *Del. C.* § 5203(b).

[14] 29 *Del. C.* § 9602 (b)(2), 29 *Del. C.* § 5210(2).

view, the SEBC enacted a policy "requiring retirees to move from their state subsidized Medicare Plan to Medicare Advantage plan [sic] or stay with their traditional Medicare and give up their State subsidized benefits." A096-097. While, for the reasons outlined above, the Appellants disagree with this characterization, it is ultimately irrelevant to the issue at bar. Rather, the question is whether the SEBC must act with the formality of a regulation under the statutory grant of authority in 29 *Del. C.* § 9602 (b)(2) and 29 *Del. C.* § 5210(3) when selecting "carriers . . . necessary to provide coverages" authorized by 29 *Del. C.* § 5203(b). The impact or import of the SEBC's decision is irrelevant to the process that must be followed in reaching a decision.

The Superior Court erred by focusing on the Court's perceived impact of the decision rather than the statutory grant of authority by the General Assembly to the SEBC. *Free-Flow* governs the SEBC's decision because the General Assembly has granted the SEBC statutory authority to select carriers for the State. The purported impact of a particular SEBC decision does not transform the act into one requiring adoption of an APA-compliant regulation. The General Assembly has pre-determined the types of coverages that the SEBC may select[15] and Medicare Advantage (selected by the SEBC) is specifically authorized.[16] As such, it is the

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[15] 29 *Del. C.* § 5203(b).

[16] Medicare Advantage plan is a Medicare Part C plan. *See* A092; A269; A302.

General Assembly that has made the policy choice; selecting among the statutorily authorized options[17] does not change the SEBC's decision into a "policy" governed by the APA under "regulation" adoption standards. Plainly, the SEBC implemented "a specific and detailed statutory directive" when selecting Medicare Advantage, which removes the act from the APA's framework under *Free-Flow*. The Superior Court, therefore, erred in holding that *Free-Flow* is inapplicable, and the decision below should be reversed.[18]

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[17] 29 *Del. C.* § 5203(b).

[18] *See Morgan v. Committee on Benefits*, 894 P.2d 378, 381 (Nev. 1995) ("Setting premium and benefits within the statutory confines designated by the legislature does not rise to the level of policy or ad hoc rule making.").

2. The Canons of Statutory Construction Show that Selection of a Carrier Is Not a Policy or Regulation Subject to the APA.

As discussed above, the Superior Court's holding that SEBC's selection of Highmark and the Medicare Advantage plan constitutes a "policy" and therefore falls within the definition of "regulation"[19] under the APA (and thereby subjects the carrier selection to the same requirements as the adoption of a regulation) should be reversed because it fails to recognize that the policy choice of what coverages can be selected has already been made by the General Assembly in 29 *Del. C.* § 5203(b). Importantly, several well recognized canons of statutory construction illustrate the legal error in the Superior Court's application of relevant statutory provisions. The Superior Court's ruling should be reversed.

First, it is axiomatic that "[t]he primary goal of statutory construction is to 'ascertain and give effect to the intent of the legislature.'"[20] Intent is determined by the plain language of the statute, and absent ambiguity, "there is no room for judicial interpretation and 'the plain meaning of the statutory language controls.'"[21] The Superior Court's construction, holding that the selection of Highmark and Medicare

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19 29 *Del. C.* § 10102(7). Regulations are adopted via a detailed, formal, and lengthy statutory procedure as outlined in 29 *Del. C.* § 10114 *et. seq.* Regulations require written submittals, public hearings, and agency findings.

20 *Acadia Brandywine Town Ctr., LLC v. New Castle Cty.*, 879 A.2d 923, 927 (Del. 2005) (citing *Dir. of Revenue v. CNA Hldgs., Inc.*, 818 A.2d 953, 957 (Del. 2003)).

21 *PHL Variable Ins. v. Price Dawe 2006 Ins. Tr.*, 28 A.3d 1059, 1070 (Del. 2011).

Advantage constitutes a "policy" qualifying as a "regulation" under the APA, fails to follow the plain language of the definition of "regulation."

A regulation is defined as a "policy . . . formulated and promulgated by an agency as a rule or standard, or as a guide for the decision of cases thereafter by it or by any other agency, authority, or court."[22] If the words are given their plain meaning, the SEBC's act is not a regulation. A contract award for Medicare Advantage is separate and distinct from an agency rule or standard,[23] and it does not act as a guide for the decision of cases in the future. The SEBC selected and entered into a contract with an insurance carrier as permitted by statute – there was no "rule or standard" implemented. Thus, the act of selecting and awarding a benefit carrier does not constitute a regulation.[24] Under the plain language definition of "regulation" in the APA, the Superior Court's decision should be reversed.

Second, "when a specific statute is enacted that appears to conflict with an existing general statute, the subsequently enacted specific statute is controlling."[25]

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[22] 29 *Del. C.* § 10102(7).

[23] A rule, in its most basic form, is "an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation." Rule, Black's Law Dictionary (11th ed. 2019).

[24] *See Medical Mgt. Rehab. Services Inc. v. Md. Dept. of Health and Mental Hygiene,* 124 A.3d 1137, 1147 (Md. App. 2015) ("the Department's RFP and the related contract award do not constitute a regulation under Maryland law.").

[25] *Lowicki v. State*, 237 A.3d 809, 2020 WL 4534903, at *3 (Del. 2020) (quoting *Cede & Co. v. Technicolor, Inc.,* 758 A.2d 485, 494 (Del. 2000)); *see also Heath v. State*, 983 A.2d 77, 81 (Del. 2009) ("If inconsistencies exist between two statutes,

The APA is a general statute, first adopted in 1976.[26] The powers of the SEBC, as outlined in 29 *Del. C.* § 9602(b) and 29 *Del. C.* § 5210, were established in 1999.[27] Because 29 *Del. C.* § 9602(b)(2) and 29 *Del. C.* § 5210(3) do not make any reference to the APA or any regulation requirements, and are statutes that relate to the specific authority of the SEBC, the better reading of these specific and later adopted statutes is that the general statute (here, the APA) does not control. Again, there is no specific legislative or statutory indication that the General Assembly intended to constrain the SEBC to select carriers and issue contracts via the formality of a regulation under the APA.

Third, when a drafter "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the drafter] acts intentionally and purposely in the disparate inclusion or exclusion."[28] A plain reading of 29 *Del. C.* § 9602(b)(2) and 29 *Del. C.* § 5210(3) demonstrates the General Assembly's intent to treat the selection of carriers separately and distinctly from the adoption of regulations because the authority for each is separately enumerated. Subsection (3) of § 5210 and subsection (2) of § 9602(b)

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we will presume the General Assembly's intent that the more specific, later-enacted statute limits the effect of the former." (citations omitted)).

26 60 Del. Laws, c. 585, § 1.

27 72 Del. Laws, c. 204, § 1; 72 Del. Laws, c. 204, § 7.

28 *In Re Request of Trustees of Lawyers' Fund for Client Protection for an Advisory Opinion,* 242 A.3d 555, 557-58 (Del. 2020); *Bragdon v. Bayshore Property Owners Assoc.*, 251 A.3d 661, 689 (Del. Ch. 2021).

place the authority for the selection of carriers for coverage with the SEBC – with no mention of any requirement that the SEBC select such carriers by adoption of, or with the formality of, a regulation. The authority to adopt rules and regulations is enumerated separately in § 5210(4) and § 9602(b)(4).

If the General Assembly desired the SEBC to act with the formality of a regulation when selecting an insurance carrier, it would have placed that instruction in 29 *Del. C.* § 9602(b)(2) and 29 *Del. C.* § 5210(3). Because the General Assembly specifically references regulations in § 5210(4) and § 9602(b)(4), and does not reference regulations in other sections, it must be presumed that the General Assembly acted intentionally and purposely in the exclusion of the regulation requirement in § 9602(b)(2) and § 5210(3). Indeed, the General Assembly could have easily stated that all acts of the SEBC must be adopted via regulation or via compliance with the APA if it so desired. Its failure to do so means that the selection and contract award to a carrier need not be done via the formality of a regulation under the APA. The SEBC has never selected carriers or awarded contracts through the formal regulation process because the applicable statutes contain no such mandate.

Fourth, Courts should also ascribe a purpose to the General Assembly's use of statutory language, and avoid construing it as surplusage, if reasonably possible.[29] If all actions of the SEBC required the formality of the APA's regulation process, the General Assembly's specific enumeration of the authority to adopt rules and regulations in § 5210(4) and § 9602(b)(4) would be rendered mere surplusage, because all acts of the SEBC would need to be performed via the regulation provisions of the APA.

Fifth, and finally, "[t]he golden rule of statutory interpretation to which we refer is that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result."[30] The Superior Court's statutory interpretation of the definition of "regulation" violates this golden rule. If every contract award for every state agency were, or might be, considered a "policy" decision subject to the formal requirements for the adoption of a regulation, state government would grind to a halt. Agencies and courts would be forced to make a highly subjective determination of which contract awards constituted a significant

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29 *Spintz v. Div. of Fam. Services,* 228 A.3d 691, 698 (Del. 2020) (quoting *In re Krafft-Murphy Co., Inc.,* 82 A.3d 696 (Del. 2013) (citations omitted)).

30 *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.,* 492 A.2d 1242, 1247 (Del. 1985). Indeed, ambiguity of a statute "may also arise from the fact that giving a literal interpretation to words of the statute would lead to such unreasonable or absurd consequences as to compel a conviction that they could not have been intended by the legislature." *Id*. at 1246.

"policy" decision such that they must be propounded as a regulation. To avoid this absurd and unworkable result, this Court's holding in *Free-Flow* should govern this case and should be affirmed: not everything an "agency does must culminate in a regulation or a case decision."[31] Selection of carriers and contract awards to selected carriers, especially with specific statutory authorization like that found here, need not be done via the formality of a regulation.

3. The SEBC's Medicare Advantage Decision Is Not Governed by the APA, and Therefore the Stay Issued Pursuant to the APA Must Be Reversed.

Because the Superior Court erred in holding that the APA applies to the SEBC's selection of Medicare Advantage, its order staying the SEBC's decision pursuant to 29 *Del. C.* § 10144 of the APA must also be reversed. Stated simply, if the APA does not apply, the Superior Court lacked authority and jurisdiction to issue a stay upon a finding of irreparable harm. Naturally, absent statutory authorization, the Superior Court cannot issue injunctive relief. Because the Superior Court lacked the authority to act under the APA, the stay order should be reversed.

Reversal of the stay order will not impact any benefit programs for the 2023 benefit year. In the wake of the Superior Court's Stay Order, the SEBC contracted for an additional year (subsequently extended to eighteen months) of the Medicare

[31] *Free-Flow*, 861 A.2d at 1236

Supplemental Health Plan.[32] A101; A347. Reversing the stay order, therefore, will clarify that statutory selection of carriers by the SEBC, as authorized by 29 *Del. C.* § 9602(b)(2) and 29 *Del. C.* § 5210(3), for plans authorized by 29 *Del. C.* § 5203(b), are not subject to the APA or the requirements needed for adoption of a regulation under *Free-Flow* for plan years 2024 and thereafter.

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32 Currently, the contract extension is until June 30, 2024.

CONCLUSION

For the reasons stated herein, Appellants respectfully request that the decision of the Superior Court regarding the stay be reversed.

DELAWARE DEPARTMENT OF JUSTICE

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