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Washington, D.C.
Paul J. D. Johnson
Chief Hearing Officer

BEFORE THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of:

COORDINATED CARE CORPORATION,

An Authorized Health Maintenance
Organization.

Docket No. 13-0232

**COORDINATED CARE
CORPORATION'S RESPONSE
TO THE OIC'S MOTION FOR
RECONSIDERATION**

I. INTRODUCTION

The OIC's motion for reconsideration should be denied in its entirety. First, and foremost, the motion is moot. There no longer exists a controversy between the parties; Coordinated Care's qualified health plan was approved by the OIC and certified by the Washington Health Benefits Exchange Board. The OIC's motion, even if granted, would not change that. The OIC's conflated concerns that the Final Order ("Order") will create dangerous precedent are both unfounded and unlikely. The Order clearly addressed a unique situation involving one company, and has no effect on other carriers in the speculative events that may occur in the future. The motion should also be denied because the Order resolved all matters at issue on the merits, fell well within the scope of the Chief Presiding Officer's authority, correctly considered evidence of the OIC's settlement negotiations with other carriers as evidence of bias, and properly ruled that Coordinated Care's network was adequate.

RESPONSE TO OIC'S MOTION FOR RECONSIDERATION - 1

1 **A. OIC's Motion for Reconsideration Should Be Denied as Moot.**

2 As a threshold matter, the OIC's motion for reconsideration should be denied in its
3 entirety because it is moot. "A case is considered moot if there is no longer a controversy
4 between the parties, if the question is merely academic, or if a substantial question no longer
5 exists." *Thurston County v. Western Washington Growth Management Hearings Bd.*, 158
6 Wn.App. 263, 271, 240 P.3d 1203 (2010).

7 Coordinated Care made a demand for hearing to challenge the OIC's disapproval of its
8 qualified plan filings for the 2014 Washington Health Benefits Exchange (the "Exchange"). In
9 that demand for hearing, Coordinated Care sought "regulatory certification from the OIC to be
10 presented to the Washington State Health Benefits Exchange as a qualified health plan for 2014."
11 *See Exhibit No. 1 (8/13/13 Demand for Hearing)*. That has been accomplished. On September
12 5, 2013, the OIC approved Coordinated Care's Bronze, Silver, and Gold Individual Plan Filings.
13 On September 6, 2013, the Washington Health Benefits Exchange Board approved Coordinated
14 Care's plans for the Exchange. Therefore, because there is no longer a controversy between the
15 parties, the case is moot. *See Thurston County*, 158 Wn.App. at 271.

16 Moreover, there is no continuing and substantial public interest requiring further action
17 here. Although some agencies have promulgated rules specifically addressing the issue of
18 whether, and when, an agency decision is considered precedential, *see* RCW 50.32.095, the OIC
19 has not done so. The Order itself has no precedential effect. *See W. Ports Transp., Inc. v. Emp.*
20 *Sec. Dep't*, 110 Wn. App. 440, 459, 41 P.3d 510 (2002) (holding "that unpublished decisions
21 have no precedential value."). The Order addressed a unique situation involving only the OIC's
22 actions pertaining to Coordinated Care in the disapproval of its plans on July 31, 2013. The
23 Order made that clear. *See Order*, 21 (¶ 15).

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1 **B. The Chief Presiding Officer Resolved All Matters at Issue and Acted Within Her**
2 **Broad Authority.**

3 **1. The Order Resolved All Matters At Issue.**

4 The OIC incorrectly argues that the Order fails to resolve the matters with a decision on
5 the merits. *See* Motion, 2. Yet, this is exactly what the Order did. First, the Order clearly
6 concludes that Coordinated Care's network was adequate. *See* Order, 17-19. The Order also
7 concludes that the OIC's disapproval of Coordinated Care's rate filings was improper and that
8 the OIC's concerns with the binder filings were simply technical corrections that could not be
9 used as a basis to disapprove Coordinated Care's filing. *See id.* at 20-21. Finally, the Order
10 concluded that the OIC's objections or concerns with Coordinated Care's form filings were
11 unclear when made, not supported by law, and/or lacked merit. *See id.* at 13-19.¹ The instances
12 where the Chief Presiding Officer suggested the OIC work with Coordinated Care were when the
13 OIC had asserted new bases for its objections after July 31, 2013. The OIC's confusion appears
14 to stem from the Chief Presiding Officer's consideration of these *new* bases/objections.

15 In its Hearing Brief and at the hearing, the OIC asserted a number of new bases to
16 support its July 31, 2013 disapproval, in an apparent attempt to apply them retroactively. For
17 example, the OIC previously objected to a number of provisions on the bases that they were too
18 restrictive or in conflict with specific laws, but after July 31 amended those bases to argue
19 instead that the language was confusing and misleading. *See, e.g.,* Objections 7, 9, 12.² The
20 OIC asserted new bases for a number of other objections as well. During argument on the OIC's
21 motion in limine at the outset of the hearing, the parties agreed that the Chief Presiding Officer
22 must consider the OIC's bases for disapproving Coordinated Care's filing *as of July 31, 2013*.
23 In other words, the OIC's later asserted reasons were not at issue and should not be considered.

24 ¹ Notably, the OIC does not challenge the Chief Presiding Officer's ruling on the binder,
25 rate, or form filing objections. Nor does the OIC contest the Chief Presiding Officer's ruling that
26 there were adequate massage therapists in the network or that there is no legal requirement to
include a Level 1 Burn Unit or pediatric specialty hospitals in Coordinated Care's network.

² The OIC abandoned its prior bases for disapproval by asserting new bases in their stead.

1 Despite this, the Chief Presiding Officer appeared to have considered the OIC's new concerns
2 anyway in an apparent attempt to be thorough and/or as a courtesy to the OIC.³ In doing so,
3 where the Chief Presiding Officer found that the OIC's *new* objections may have merit, she
4 recommended that the OIC promptly review and/or suggest amended language that would
5 address its concern. This does not mean the Order did not resolve the material issues on the
6 merits. It simply allowed Coordinated Care to address the OIC's late-asserted concerns. The
7 Order essentially held that the OIC improperly disapproved Coordinated Care's plan and given
8 the short time period to correct the error, noted that the Chief Presiding Officer expected the OIC
9 to promptly work with Coordinated Care to address any outstanding issues to ensure timely
10 approval for the Exchange.

11 **2. The Chief Presiding Officer Acted Within the Her Scope of Authority.**

12 The OIC argues that the Chief Presiding Officer acted outside of her authority in ordering
13 (1) the OIC to give reasonable guidance and recommended language to Coordinated Care, (2) the
14 OIC to "give prompt review and reasonable approval of the Company's filings provided the
15 company has addressed the reasons for disapproval," and (3) that the proceeding be held open
16 until the Company has made new/amended filings. *See* Motion, 3. This argument is flawed for
17 at least two reasons.

18 First, the OIC incorrectly interprets the Order to direct settlement with Coordinated Care.
19 The Order does not direct settlement or compel the OIC's discretion. Rather, it requires the OIC
20 to take necessary actions to address the improper disapproval of Coordinated Care's filings and
21 ensure that the error was corrected in time to get Coordinated Care's plan approved for the
22 Exchange. Nor does the Order compel the OIC to draft portions of the filings, as the OIC argues
23 in its Motion. *See* Motion, 5. Rather, it gives the OIC a choice. For example, for the new
24 concerns raised by the OIC after the July 31 disapproval, the Order repeatedly states that the OIC

25 ³ Coordinated Care would have objected if the OIC's newly asserted bases for
26 disapproving Coordinated Care's filing were concluded to be a proper basis for the OIC's July
31 disapproval.

1 “should promptly review *and/or* suggest amended language. . . “ to address its concerns. *See*,
2 *e.g.*, Order, 15 (¶ 9) (addressing new bases for Objection No. 9) (emphasis added). Consistent
3 with this, the Order provides that “it is expected” that the OIC will “provide prompt, reasonable
4 guidance and recommended language to the Company *as appropriate* to assist the Company. . .
5 .” *Id.* at 22 (emphasis added). And the Order does not require the OIC to approve Coordinated
6 Care’s plan no matter what (*i.e.*, directing settlement). It only requires the OIC to give
7 “reasonable” approval *if* the Company addressed the reasons for disapproval set forth in the
8 OIC’s July 31, 2013 Disapproval Letter (as modified by the Conclusions of Law in the Order) to
9 the reasonable satisfaction of the OIC. *Id.* This is all within the Chief Presiding Officer’s
10 authority. *See* RCW 34.05.461(3) (final orders shall include findings, conclusions, and “the
11 remedy”).

12 Second, even if the Order was interpreted to encourage or require settlement, this is not
13 prohibited by any statute, regulation, or rule. The Chief Presiding Officer has broad authority
14 under the Administrative Procedures Act (“APA”), Insurance Code, and Model Rules of
15 Procedure. As noted by the OIC, the APA strongly encourages informal settlements. The APA
16 allows the Chief Presiding Officer to serve as a mediator or take any other action necessary and
17 authorized by any applicable statute or rule. WAC 10-08-200(15)-(16). Moreover, WAC 284-
18 02-070(2)(d)(iv) expressly provides that “conferences for settlement or simplification of issues
19 may be held at the discretion and direction of the chief presiding officer.” Nothing in the APA
20 or the Model Rules of Procedure precludes a hearing officer from ordering the agency to take the
21 actions included in the Order.

22 3. No Dangerous Precedents Are Created.

23 No reasonable person reading the Order would understand it to mean that the OIC is
24 required to “provide specialized and directed legal advice to a specific private company” or to
25 “draft portions of their contracts” as the OIC suggests. *See* Motion, 5. As noted above, the
26 Order gave the OIC a choice to either review proposed language or to suggest some. The Chief

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1 Presiding Officer simply wanted to ensure that the parties worked together in good faith,
2 especially given the limited timeframe available for approval, to expeditiously address the OIC's
3 new concerns with the filings.

4 The OIC argues that the Order creates a conflict of interest for the OIC by inviting the
5 OIC to propose language that would address its concerns. *See* Motion, 5-6. It is unclear what
6 conflict could exist. Both the OIC and Coordinated Care's interest are aligned in ensuring that
7 Coordinated Care's filings comply with the laws and do not mislead or harm consumers.
8 Moreover, the OIC's argument that suggesting language somehow precludes it from taking later
9 enforcement action against Coordinated Care concerning those contract provisions is
10 nonsensical. Unless there is a change in law that provides a legitimate basis for requiring
11 Coordinated Care to revise its contract language, there would be no need to challenge contract
12 language that was deemed to have complied with the laws. These arguments should be
13 dismissed as frivolous.

14 Additionally, nowhere in the Order does the Chief Presiding Officer state or imply that
15 the OIC is required to settle with Coordinated Care because it has settled with other carriers.
16 Therefore, the OIC's irrational fear that the Order somehow created "dangerous precedent that
17 the OIC is now *compelled* to settle with any carrier who challenges the OIC's disapproval of
18 their network, rate, form, or binder filings" should be disregarded. *See* Motion, 6. No
19 reasonable person reading the Order would interpret it to mean that the OIC is required to settle
20 with all parties if it settles with one.

21 **C. The Chief Presiding Officer Properly Considered Evidence of Settlement**
22 **Negotiations.**

23 The OIC argues that the Chief Presiding Officer improperly introduced and relied on
24 evidence of the OIC's settlement negotiations with other carriers, which should have been barred
25 by ER 408. *See* Motion, 8-11. This argument is without merit.⁴

26 ⁴ The OIC also states that "the challenged directives in the Final Order rely on factual errors" (*see* Motion, 8), but does not articulate any factual errors in its argument.

1 First, the OIC overstates the Chief Presiding Officer's considerations of the other
2 settlement negotiations. Evidence of those negotiations did not impact the Chief Presiding
3 Officer's conclusions of laws regarding the OIC's specific objections to Coordinated Care's
4 network adequacy, or its form, rate, and binder filings. Indeed, the Order makes no mention of
5 the settlement negotiations in those relevant rulings. *See* Order, 13-22 (¶¶ 11-15).

6 Second, the Chief Presiding Officer is not bound by the Washington Rules of Evidence.
7 WAC 284-02-070(2)(d) provides that "[a]djudicative proceedings or contested case hearings of
8 the insurance commissioner are informal in nature, and compliance with the formal rules of
9 pleading and evidence is not required." *See also* RCW 34.05.452(1) (allowing presiding officer
10 to consider evidence on which reasonably prudent persons are accustomed to rely on in the
11 conduct of their affairs). RCW 34.05.461(4) also expressly allows the Chief Presiding Officer to
12 base findings of fact on the kind of evidence on which reasonably prudent persons are
13 accustomed to rely in the conduct of their affairs, even if it would be inadmissible in a civil trial.

14 Third, under ER 408, the Chief Presiding Officer may consider evidence of settlement
15 negotiations to show bias. The OIC concedes this point in its motion, but mistakenly argues that
16 there were no claims of bias presented in this case. *See* Motion, 9. As noted in the Order,
17 Coordinated Care argued in its prehearing brief that it was being treated unfairly by the OIC in
18 comparison to the other carriers. *See* Order, 8 (¶ 20). This claim of bias was further articulated
19 by Dr. Fathi during the hearing. *Id.*; *see also* testimony of Dr. Fathi. The Chief Presiding
20 Officer had discretion to consider this evidence in light of that claim. ER 408.⁵

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23 ⁵ *Grigsby v. City of Seattle*, 12 Wn.App. 453, 529 P.2d 1167 (1975) is inapposite.
24 Because it was not before an administrative law judge or hearing officer under the APA, the
25 court was required to strictly comply with evidence rules. *Grigsby* also did not involve a claim
26 of bias, as here. Moreover, the court there found it was improper to have informed the jury that
the plaintiff had settled with the driver. There is no jury here. And, the Chief Presiding Officer
was already informed of the OIC's settlement negotiations with other carriers through public
proceedings.

1 Fourth, it was wholly within the Chief Presiding Judge's discretion to personally elicit
2 evidence of the OIC's settlement negotiations with other carriers whose plans were previously
3 disapproved by the OIC.⁶ WAC 10-08-200 expressly grants the presiding officer authority to:

4 (8) Interrogate witnesses called by the parties in an impartial
5 manner to develop any facts deemed necessary to fairly and
adequately decide the matter;

6 (9) Call additional witnesses and request additional exhibits
7 deemed necessary to complete the record and receive such
evidence subject to full opportunity for cross-examination and
8 rebuttal by all parties; [and]

9 (10) Take official notice of facts pursuant to RCW 34.05.452(5)[.]

10 The OIC argues, however, that the Chief Presiding Officer violated RCW 34.05.461(4)
11 because the findings were based *exclusively* on inadmissible evidence. *See* Motion 8-9. Under
12 RCW 34.05.461(4), "the presiding officer shall not base a finding exclusively on such
13 inadmissible evidence unless the presiding officer determines that doing so would not unduly
14 abridge the parties' opportunities to confront witnesses and rebut evidence." Because the
15 evidence was admissible to prove bias and the findings were also based on the admissible
16 testimony of Dr. Fathi and the OIC, this portion of the statute does not apply. Regardless, the
17 Order does not hinge exclusively on the finding that the OIC engaged in settlement negotiations
18 with other carriers.

19 Finally, the OIC's accusation that the Chief Presiding Officer is somehow biased or
20 prejudiced is completely unfounded. Again, as noted above, there was a legitimate reason for the
21 Chief Presiding Officer to consider the OIC's settlement negotiations with other carriers. Her
22 consideration of that evidence does not prove her partiality. The OIC presents no other evidence
23 to suggest the Chief Presiding Officer was not impartial here. If the OIC had these concerns
24 during the hearing, it could and should have filed a petition to disqualify Judge Peterson pursuant

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26 ⁶ Contrary to the OIC's implications, the Chief Presiding Officer did not herself testify
about the settlement negotiations but rather sought information from the parties.

1 to RCW 34.05.425(4), but did not do so. Moreover, the Code of Judicial Conduct (“CJC”) does
2 not apply to Administrative Law Judges (*see* RCW 2.64.010(10)). Nor is the CJC “intended to
3 be the basis for litigants to seek collateral remedies against each other or to obtain tactical
4 advantages in proceedings before a court.” *See* Commission on Judicial Conduct’s website, ¶ 7
5 (available at http://www.cjc.state.wa.us/Gov_provision/code_scope.htm (last visited 9/26/13)).
6 The OIC’s challenge on this basis is improper.

7 **D. The Chief Presiding Officer Properly Ruled that Coordinated Care’s Network Was**
8 **Adequate.**

9 In its motion, the OIC argues that the Chief Presiding Officer erred in ruling that
10 Coordinated Care’s network was adequate. First, the OIC argues that the Chief Presiding Officer
11 misconstrued WAC 284-43-200 to mean that proof of compliance with the Medicaid standards
12 necessarily means that the network is adequate, and erred in ruling that Coordinated Care’s
13 network was adequate on that basis. This is incorrect and a clear mischaracterization of the
14 Chief Presiding Officer’s ruling. In the Order, the Chief Presiding Officer correctly noted that
15 “WAC 284-43-200(2) provides that evidence of compliance with the network adequacy
16 standards that are substantially similar to standards established by state agency purchasers (e.g.
17 Medicaid) may also be used to demonstrate sufficiency.” *See* Order, 17 (¶ 12(b)). The Chief
18 Presiding Officer then found that Coordinated Care presented evidence in its Network Access
19 Plan that demonstrated that its network is substantially similar to the standards established by
20 Medicaid, a fact that was undisputed by the OIC. *Id.* at 17-18 (¶ 12(b)).⁷ Based in part on that
21 evidence, the Chief Presiding Officer held that the Company has shown that its network is
22 adequate. *Id.* at 18. This ruling was also based on the fact that there is no law that requires
23 carriers to include Level 1 Burn Units or pediatric hospitals in their networks (a basis the OIC

24 ⁷ Contrary to the OIC’s assertions, the Chief Presiding Officer’s ruling was not based on
25 a belief that Coordinated Care’s proposed Exchange network was identical to its Medicaid
26 network. The Chief Presiding Officer based her ruling on the fact that Coordinated Care had
demonstrated in its Network Access Plan that its Exchange network was substantially similar to
the Medicaid standards. Order, 17-18.

1 ignores in its motion). *Id.* at 17 (¶ 12(b)). Moreover, the Chief Presiding Officer had more than
2 ample evidence from the testimony of Dr. Jay Fathi and Sara Ross that Coordinated Care's
3 network properly ensured that its consumers would obtain the necessary services from a provider
4 or facility within reasonable proximity of the consumers either through a network provider or
5 other providers at no greater cost to the consumer than if the service were obtained from network
6 providers and facilities. *See* Testimony of Dr. Fathi and Ms. Ross; *see also* Exhibit No. 2
7 (Coordinated Care's Network Access Plan). None of this evidence was refuted by the OIC. The
8 Chief Presiding Officer made no error of law.

9 The OIC also argues that the Order does not include a discussion demonstrating that
10 Coordinated Care's *Medicaid* plan and network cover all of the essential health benefits required
11 by law. *See* Motion, 12. This is not required. Coordinated Care's Medicaid network was not at
12 issue. To the extent the OIC believes that the Chief Presiding Officer was required to show in
13 the Order that Coordinated Care's proposed *Exchange* network covered all of the essential health
14 benefits required by law, this is also incorrect. It was the OIC's obligation to evaluate
15 Coordinated Care's network to determine whether it was adequate under the laws. The Chief
16 Presiding Officer had no obligation to do the OIC's job in further evaluating other aspects of the
17 network. The OIC itself advised the Chief Presiding Officer at the hearing and in its Hearing
18 Brief that it only had three remaining concerns about Coordinated Care's network, which were:
19 (1) that Coordinated Care has no massage therapists in its provider network, (2) that
20 Coordinated Care has no Level 1 Burn Unit or pediatric specialty hospitals in its network, and
21 (3) that Coordinated Care is not allowed to use single case agreements (also referred to at the
22 hearing as "spot contracts" or "single payer agreements") to complete its network of providers.
23 *See* Order, 16-17 (¶ 12). The Order clearly addressed all of these issues and held that none had
24 merit. *See id.* at 17-19 (¶ 12).

25 The second error of law asserted by the OIC is the Chief Presiding Officer's ruling that
26 single case agreements are permitted under WAC 284-43-200. The OIC argues that this ruling is

1 an express violation of RCW 48.46.030(1). *See* Motion, 12-13. However, RCW 48.47.030
2 addresses the eligibility requirements for certification as an HMO. It does not address the
3 standards required to show network adequacy. Those standards are addressed in WAC 284-43-
4 200. Coordinated Care's license or certification as an HMO was not at issue in the hearing.
5 Moreover, RCW 48.46.030 in no way prohibits the use of single case agreements. It does not
6 require services provided to a HMO's customers to be through previously contracted, network
7 providers. It only requires that the HMO provide comprehensive services to its customers
8 directly or through arrangements with institutions, entities, and persons as the customer may
9 require as determined by the HMO to maintain good health. RCW 48.46.030(1). The
10 undisputed evidence at the hearing was that this is exactly what Coordinated Care provides. *See*
11 Testimony of Dr. Jay Fathi and Sara Ross; *see also* Exhibit No. 2 (Coordinated Care's Network
12 Access Plan). The Chief Presiding Officer properly held that single case agreements are
13 permitted under WAC 283-43-200 and commonly used in the industry.

14 **E. The Finding Pertaining to the OIC's Stated Basis for Refusing to Talk to**
15 **Coordinated Care is Supported by Credible Evidence.**

16 In its last argument, the OIC challenges the finding that the OIC informed Coordinated
17 Care that it was prohibited from communicating with Coordinated Care because Coordinated
18 Care had filed a Demand for Hearing. The OIC claims that this finding was not supported by
19 evidence in the record. *See* Motion, 13-14. However, Dr. Fathi testified to this at the hearing.
20 Indeed, the Order expressly cites to Dr. Fathi's testimony in support of this finding. *See* Order,
21 7-8 (¶ 20). The Chief Presiding Officer expressly found that Dr. Fathi presented his testimony in
22 a detailed and credible manner and presented no apparent biases. *See id.* at 9 (¶ 25). Dr. Fathi's
23 testimony is both admissible and may be considered by the Chief Presiding Officer in making
24 her findings of fact. RCW 34.05.461(4); *see also* RCW 34.05.452(1) (evidence, including
25 hearsay evidence, is admissible if it is of the kind which reasonable prudent persons rely on in
26 the conduct of their affairs).

1 The Chief Presiding Officer never found that the OIC had a "policy" of refusing to
2 communicate with carriers in litigation. She only concluded that there was no law that
3 prohibited the OIC from communicating with Coordinated Care because it filed a Demand for
4 Hearing. *Id.* at 12 (¶ 8). This is consistent with RCW 34.05.060, which strongly encourages
5 informal settlements, and WAC 10-08-230(2)(a), which allows for settlement of adjudicative
6 proceedings through informal negotiations with the agency. At no point did the Chief Presiding
7 Officer state that the OIC should do so without counsel or in a manner that would violate any
8 Rule of Professional Conduct.

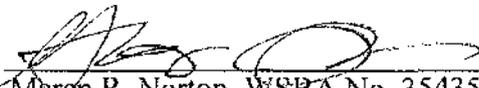
9 Because these findings are clearly supported by evidence in the record, there is no need to
10 reconsider this issue.

11 II. CONCLUSION

12 For the foregoing reasons, Coordinated Care respectfully requests that the Chief
13 Presiding Officer deny the OIC's Motion for Reconsideration in its entirety.

14 DATED: September 26, 2013.

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