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STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In re	}	DOCKET NO. 13-0293
Seattle Children's Hospital's Appeal of OIC's Approvals of HBE Plan Filings	}	MOTION IN LIMINE TO EXCLUDE TESTIMONY OF ELIZABETH BERENDT

I. RELIEF REQUESTED

Seattle Children's Hospital ("SCH") seeks to offer the testimony of Elizabeth Berendt regarding her work as former Deputy of Rates and Forms with the Office of Insurance Commissioner ("OIC") as well as "the issue of remedies that the OIC has used relating to inadequate networks."¹ Ms. Berendt was involved in the OIC's review and approval of the Exchange networks, the adequacy of which will be adjudicated in this proceeding. As such, she is not only precluded from offering any form of expert opinion in this matter under state law, but is also prohibited from assisting SCH in this matter at all.

Neither the OIC nor Interveners have designated her as a witness, and she should not be allowed to testify as part of SCH's case in any capacity, whether as a fact or expert witness. That she has become a paid consultant of SCH as to the very issues that will be adjudicated in this proceeding itself violates myriad Washington laws and public policy.

¹ Seattle Children's Hospital's Disclosure of Possible Primary Witnesses, p.2.

SCH should not be allowed to compound these violations and indeed capitalize on them by calling Ms. Berendt as part of its case-in-chief. Therefore, her testimony should be excluded entirely.

II. STATEMENT OF FACTS

SCH challenges the decision by the OIC to approve Premera Blue Cross's ("Premera's") and BridgeSpan Health Plan's ("BridgeSpan's") rate and network filings for sale on the Washington Health Benefit Exchange ("HBE"). In support of its position, SCH offers the testimony of Beth Berendt, former Deputy Commissioner of Rates and Forms with the OIC. Deposition of Elizabeth Berendt, 17:1-5. SCH retained Ms. Berendt for \$5,000 a month when this matter was initiated in October 2013. SCH has arranged for her to testify on its behalf regarding her role in the review of the health plans' filings. Berendt Dep., 10:15-16; 94:12.

As Deputy Commissioner of Rates and Forms, Ms. Berendt was responsible for the executive oversight of the Rates and Forms division. Berendt Dep., 20:7-15. The Rates and Forms Division is responsible for the review and approval of insurance products, including policy forms, the actuarial review of rates, provider contracting and provider networks, and all other required forms. Berendt Dep., 18:13-22. In this position, Ms. Berendt was familiar with discussions regarding BridgeSpan and Premera network development and approval for the HBE 2014 plan year, including plan compliance with network adequacy regulations. She was responsible for supervising the analysts and managers who actually performed the regulatory review process. Berendt Dep., 20:25-21:7; 23:22-25:23; 26:19-29:35. Indeed, it was Ms. Berendt who performed the network adequacy review for the Premera and LifeWise networks, as well as many other plans' networks. Kreitler Dep., 24:8-25; 29:5-12; Nollette Dep., 22:18-21. Ms. Berendt continued in this position until she resigned as Deputy Commissioner of Rates and Forms effective July 1, 2013, just one month before the OIC

formally approved the BridgeSpan and Premera health plans as QHPs for the 2014 plan year. Berendt Dep., 16:17-17:10.

Since leaving the OIC and starting her consulting work with SCH, Ms. Berendt has acted as SCH's spokesperson in its dealings with the OIC, and in particular with respect to the issues raised by this matter. For example, Ms. Berendt directly contacted Mary Childers, the Consumer Advocacy Program Manager for the Consumer Protection Division of the OIC, with regards to SCH's treatment of Premera and BridgeSpan members. See Exhibit 43. Her email to Ms. Childers states, in part, "It is pretty evident that this is going to be a real problem. I hope the data in this letter will be enough to trigger a market oversight continuum letter to the companies – since they are obviously missing the deadlines for turning around the pre-auths." *Id.* Here, Ms. Berendt leverages her former position at the OIC to convince the agency to act in a way advantageous to SCH. In other words, Ms. Berendt's role since leaving the OIC is unequivocally one of an advocate on behalf of SCH.

III. LEGAL ARGUMENT

A. The Presiding Officer Has the Authority to Grant This Motion in Limine.

A pre-trial motion in limine may be brought to decide certain evidentiary issues before they arise at trial. *Fienmore v. Drake Construction Co.*, 87 Wn.2d 85, 549 P.2d 483 (1976); *State v. Smith*, 189 Wn. 442, 65 P.2d 966 (1937). The Washington Administrative Procedure Act provides that a presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds. RCW 34.05.452(1).

B. RCW 42.52.080 Prohibits Ms. Berendt from Testifying in This Matter.

As a former state employee who directly participated in the regulatory review and approval which SCH currently challenges, Ms. Berendt is precluded from testifying on behalf of SCH in this matter. Here SCH is calling her as part of its case-in-chief. Neither the OIC nor Interveners have designated her as a witness. She should not be allowed to testify as part of SCH's case in any capacity, whether as a fact or expert witness. This would be true even if

she were not a witness who is being paid by SCH. That she has become a paid vendor of SCH as to the very matters at issue in this case only compounds the problem. SCH and Ms. Berendt should not be permitted to capitalize on their serious ethical violations.

Washington's Ethics in Public Service Act regulates the conduct of state employees with the objective of promoting honesty and integrity in government. RCW 42.52.900 (legislative declaration of policy regarding the Ethics Act). The Ethics Act is to be "construed liberally to effectuate its purposes and policy." RCW 42.52.901.

The Ethics Act provides in pertinent part:

No former state officer or state employee may at any time subsequent to his or her state employment assist another person, whether or not for compensation, in any transaction involving the state in which the former state officer or state employee at any time participated during state employment.

RCW 42.52.080(5). The Ethics Act defines "transaction involving the state" as follows:

(a) "Transaction involving the state" means a proceeding, application, submission, **request for a ruling or other determination, contract, claim, case, or other similar matter** that the state officer, state employee, or former state officer or state employee in question believes, or has reason to believe: (i) is, or will be, the subject of state action; or (ii) **is one to which the state is or will be a party**; or (iii) is one in which the state has a direct and substantial proprietary interest.

(b) "Transaction involving the state" does not include the following: Preparation, consideration, or enactment of legislation, including appropriation of moneys in a budget, or the performance of legislative duties by an officer or employee; or a claim, case, lawsuit, or similar matter **if the officer or employee did not participate in the underlying transaction involving the state that is the basis for the claim, case, or lawsuit.** [Emphasis added.]

RCW 42.52.010(21). To "participate" means to "participate in state action or a proceeding personally and substantially as a state officer or state employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation, or otherwise but does not include preparation, consideration, or enactment of legislation or the performance of legislative duties." RCW 42.52.010(13).

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The OIC Ethics Policy explicitly provides that “[a]ll of the provisions of RCW 42.52.080, Employment after Public Service, apply,” and explains that a “former OIC employee may not assist other people in a transaction involving the state if, at any time, the employee participated in that transaction during his or her state employment.” Ethics Policy, Office of Insurance Commissioner (approved July 13, 2007), at 10, *available at* http://www.ethics.wa.gov/RESOURCES/Agency_Policy_reviews.htm.

In an advisory opinion, the Washington State Executive Ethics Board concluded that RCW 42.52.080(5) prohibited “a former state employee from assisting another person in a transaction involving the state in which the employee participated.” *Assisting in a Transaction*, Ethics Board Advisory Opinion 97-06, *available at* http://www.ethics.wa.gov/ADVISORIES/Advisory_Opinions_07.htm. Specifically, the employee in question in the opinion had worked for the Department of Ecology making decisions about applications for water rights permits. *Id.* After the employee left state service, a certain application was denied. *Id.* The employee subsequently desired to assist the applicant in appealing the denial. *Id.* The Ethics Board concluded the “fact that additional work was done on the permit after the employee left state service” did not “lessen the employee’s involvement,” and thus the former employee could not lawfully assist the applicant in the appeal. *Id.*

Likewise, here, as the former Deputy Commissioner of Rates and Forms, Ms. Berendt held executive responsibility over the regulatory review and approval of all health plan rates, forms and network filings submitted by issuers for sale on the Exchange, the very transaction involving the state that is the basis of SCH’s Demand for Hearing.² It is undisputed that Ms. Berendt participated in the “underlying transaction involving the state that is the basis for the claim, case or lawsuit,” not only does she admit to executive responsibility over the rate filing and network adequacy review process through July 2013, but SCH proposes to offer

² SCH Demand for Hearing at 1 (“SCH submits this demand for hearing...to challenge the decisions by the Office of the Insurance Commissioner approving the following individual market Exchange rate request filings.”).

her testimony regarding her role in the review of BridgeSpan's and Premera's provider networks for the 2014 plan year in support of their position. As a result, her testimony regarding the review of BridgeSpan's and Premera's Exchange filings for the 2014 plan year is prohibited under RCW 42.52.080.

C. Ms. Berendt May Not Offer Expert Testimony on Behalf of SCH in This Matter.

Even if Ms. Berendt were allowed to testify about factual matters relating to OIC approval of the BridgeSpan and Premera Exchange filings, as a former employee of the OIC Ms. Berendt may not offer expert testimony on behalf of SCH unless she receives permission from the OIC. WAC 10-08-140(4) provides that "[n]o former employee of the agency shall appear, except with the permission of the agency, as an expert witness on behalf of other parties in a proceeding in which he or she previously took an active part in the investigation as a representative of the agency." As discussed *supra*, as Deputy Commissioner of Rates and Forms for the OIC, Ms. Berendt took an active part in the review of BridgeSpan's and Premera's individual market Exchange filings, the agency regulatory inquiry which is at issue in this matter. As a result, she may not offer her opinion regarding regulatory requirements absent permission from the OIC, which has not been granted.

But even to the extent that SCH may argue that Ms. Berendt's testimony is purely factual, this tribunal should exclude her testimony because of her paid engagement with SCH.

IV. CONCLUSION

For the foregoing reasons, Ms. Berendt may not testify during the evidentiary hearing in this matter, and her deposition testimony should not be considered in this case.

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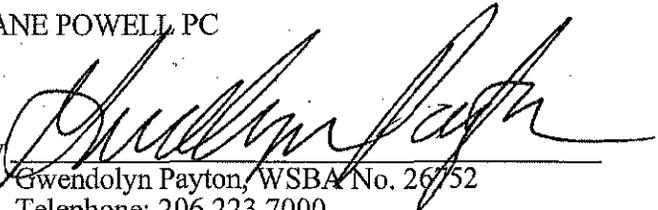
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DATED: August 11, 2014

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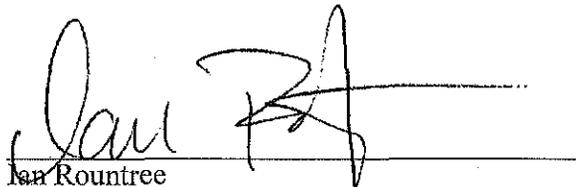
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CERTIFICATE OF SERVICE

I, Ian Rountree, hereby certify under penalty of perjury of the laws of the State of Washington that on August 11, 2014, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address(es):

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