

FILED

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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	}	PREMERA AND BRIDGESPAN'S REPLY IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE TESTIMONY OF ELIZABETH BERENDT

Premera Blue Cross ("Premera") and BridgeSpan Health Company ("BridgeSpan") submit this reply in support of their motion in limine ("Motion") to exclude the testimony of Elizabeth Berendt, former Deputy Commissioner of Rates and Forms with the OIC, which Seattle Children's Hospital ("SCH") seeks improperly to offer into evidence.

I. INTRODUCTION

RCW 42.52.080, which the parties agree controls and is to be construed liberally, prohibits a **former** employee such as Ms. Berendt from assisting SCH by acting as a consultant to SCH on the very issues being adjudicated in this proceeding, and then further assisting SCH by testifying as part of its case-in-chief in this proceeding. Motion at 4-5. However, the exception set forth in RCW 42.52.060 enables any party in this proceeding through compulsory process to call **current** state employee, including OIC employees, to testify regardless of RCW 42.52.080. Here, Ms. Berendt is a **former** employee testifying while being paid \$5,000 per month by SCH for consulting services directly related to the

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Office of Insurance Commissioner's ("OIC's") approval of Interveners' networks, the "transaction" that is at issue in this proceeding. As such, she should be precluded from testifying.

This conclusion is in keeping with the vital objective of Washington's Ethics in Public Service Act: promoting honesty and integrity in government. Motion at 4-5. To allow Ms. Berendt to be paid to "consult" on the very issues in which she was involved during the course of her public service and then to testify in that capacity would do violence to the legislature's objective.

Further, SCH contends that the "transaction" at issue here—as to which Ms. Berendt would be prohibited from "assisting" SCH—is SCH's appeal of the OIC's July 31, 2013 approval, which began in October 2013, after Berendt left the OIC, not the July 31, 2013 approval itself. This argument is sophistry. The July 31, 2013 approval is the "transaction" at issue under RCW 42.52.080. Ms. Berendt herself admits that she was deeply involved in the OIC's review and approval of Interveners' networks. As such, she is precluded from assisting the OIC by testifying in this proceeding as part of its case about her involvement in this transaction.

A. RCW 42.52.080(5), Which Prohibits Ms. Berendt's Testimony, Is Controlling with Respect to Former State Employees Such as Ms. Berendt.

Under RCW 42.52.060, current state employees are not generally prohibited from testifying under oath. "This chapter does not prevent a state officer or state employee from giving testimony under oath or from making statements required to be made under penalty of perjury or contempt." Thus, RCW 42.52.060 enables any party in this proceeding through compulsory process to call current state including OIC employees to testify.

Here SCH does not deny that Berendt will not be testifying as a current state employee; rather, she will be testifying as a paid consultant for SCH. The exception in RCW 42.52.060 does not apply.

In contrast, RCW 42.52.080(5) refers to the specific instance in which a **former** state employee is considering assisting in a transaction in which that employee previously participated during his or her state employment. *See* RCW 42.52.080(5). SCH concedes that RCW 42.52.060 refers generally to the entire Ethics Act, Chapter 42 RCW. Seattle Children's Hospital's Response to Interveners' Motion in Limine re Testimony of Elizabeth Berendt ("Opp.") at 1, 4 ("The reference to 'this chapter' is broad enough to include the provisions of RCW 42.52.080 . . .").

As described in the Motion, RCW 42.52.080(5), which is part of Washington's Ethics in Public Service Act ("Ethics Act"), provides that a former state employee may not "assist another person . . . in any transaction involving the state in which the former . . . state employee at any time participated during state employment." This statute precludes Ms. Berendt from "assisting" SCH with respect to the issues that will be adjudicated in these proceedings because she was involved in reviewing Interveners' proposed networks under the ACA and related Washington law. She has already violated this prohibition by undertaking paid consulting activities for SCH. Were she allowed to testify as part of SCH's case-in-chief, she would compound her prior violations of the ethics laws.

B. SCH Cannot Circumvent RCW 42.52.080(5) by Claiming that the OIC's Approval Process Consists of Disparate Parts.

SCH seems to argue that if Ms. Berendt is disqualified from testifying about anything, she should be precluded from testifying only about SCH's appeal from the OIC's approval. The transaction at issue here is not SCH's appeal of the OIC's July 31, 2013 approval of Interveners' networks, as SCH contends; it is the July 31, 2013 approval itself. SCH's argument is sophistry.

SCH's *post hoc* attempt to artificially disassemble the OIC review process must fail. Specifically, SCH's invocation of Ethics Board Advisory Opinion 98-02 is inapposite. Opp. at 5. That opinion involved a Department of Ecology "sediment cleanup process" consisting

of “four identifiable steps—site identification and ranking, investigation, the cleanup decision, and the cleanup action.” Transactions Involving the State, Ethics Board Advisory Opinion 98-02, available at http://www.ethics.wa.gov/ADVISORIES/Advisory_Opinions_07.htm (hereinafter “Transactions Involving the State”). The Washington State Executive Ethics Board concluded:

Because a site listing does not necessarily result in an investigation, cleanup decision, and cleanup action, the “site identification” or “site listing” step may be identified as one transaction. The second transaction includes the investigation, cleanup decision, and cleanup action phases, because the sediment cleanup specialist actively participates in regulatory decisions and actions during each of these steps, and state action in a subsequent step is dependent upon state actions in the previous step.

Under this analysis, a former state employee whose participation was limited to site identification or site listing only, could assist persons during a subsequent investigation, cleanup decision and cleanup action without incurring a violation of RCW 42.52.080(5). However, if the former state employee participated in the investigation, cleanup decision, and cleanup action with regard to any site, the former employee may not assist other persons in those transactions after leaving state employment.

Id.

Here, there was no “multi-stage process,” as SCH contends. Opp. at 5. Rather, the OIC’s unitary review process, which lasted some months, began in the summer of 2012 after Premera submitted to the OIC its proposal for a new “value-based network.” Berendt 27-28. The review process, which included federal reporting and a review of policy contracts, premium rates, and networks, culminated in Ms. Berendt’s approval of the Premera networks prior to her leaving the OIC. Berendt 21-22; Nollette 40:24-41:21, 44:19-46:4, 49-51; Exs. 99, 100. After Ms. Berendt left, Jennifer Kreitler and Molly Nollette merely confirmed Ms. Berendt’s approval of the Premera networks. Nollette 43:8-19, 64; Kreitler 26-28; Ex. 103.

Unlike in the advisory opinion SCH cites, the cohesive review process here is not susceptible of being described in discrete “identifiable steps.” See Transactions Involving the

State. It is certainly not true, as SCH suggests, that this appeal is a distinct transaction from the approval that will be adjudicated in this case.

C. Ms. Berendt More than “Personally and Substantially” Participated in the Approval of the Networks: She Herself Approved Them.

SCH would have this tribunal believe that it was Ms. Nollette who approved the plans and networks at issue in this proceeding. Opp. at 5. But as described above, Ms. Nollette merely confirmed what Ms. Berendt had already done. *See* discussion *supra* Part I.B. Regardless of whether Berendt actually approved the networks, however, at the very least, Ms. Berendt was heavily involved in the OIC’s determination of the adequacy of Premera’s network.

Every witness with knowledge of the matter including Ms. Berendt has testified that Ms. Berendt was directly involved in the approval process. Kreitler Dep., 24:8-25; 29:5-12; Nollette Dep., 22:18-21; Maturi Dep., 13:17-14: 2; Lehmann Dep., 7:10-8:11. At the time of the approval of the Exchange plans, the analyst working under Berendt who reviewed the networks was Ms. Kreitler. Berendt 31-32. Ms. Kreitler was responsible for generating the letters back to Premera and any further required interactions with Premera regarding its proposed Exchange networks. Berendt 21:15-25.

Ms. Berendt testified that she and Ms. Kreitler worked closely together. Berendt 31-32. She testified that Ms. Kreitler would come to her to discuss issues, concerns, and particular problems regarding the proposed networks as they dealt with “the Premera product development.” *Id.*

Additionally, the trial exhibits contain multiple examples of Ms. Berendt’s involvement with the back-and-forth with Premera regarding the adequacy of its network. *See, e.g.*, Dep. Ex. 85; Dep. Ex. 86; Dep. Ex. 87.

Ms. Berendt’s role as an advocate on behalf of SCH, however, is undisputed. As reflected in an email to the OIC’s Consumer Protection Division, Ms. Berendt has been

directly advocating on behalf of SCH to the OIC and her former colleagues at the department. *See* Dep. Ex. 43. Thus SCH's argument in this regard must fail as well.

D. The Motion Was Timely Filed.

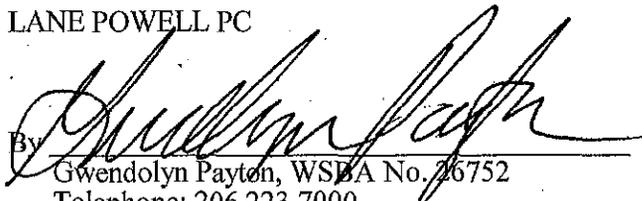
In its response to the Motion, SCH suddenly claims that the Motion should have been submitted by August 8, 2014, in order to allow SCH additional time to prepare its response. Opp. at 6. This argument lacks merit. At the Prehearing Conference held on August 6, 2014, all the parties agreed that prehearing motions would be submitted by August 11, 2014, with responses due by August 14 and replies due by August 15. SCH never asked for additional time to respond to Interveners' motions and has in fact responded according to the timeline agreed upon at the hearing. Moreover, nowhere does SCH make any claims that it has been prejudiced in any way by the agreed-upon timeline.

II. CONCLUSION

For the foregoing reasons, this tribunal should not consider Ms. Berendt's deposition testimony in these proceedings and should not allow her to testify during the evidentiary hearing in this matter.

DATED: August 15, 2014

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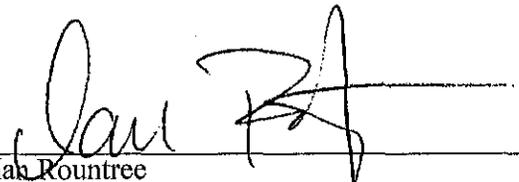
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CERTIFICATE OF SERVICE

I, Ian Rountree, hereby certify under penalty of perjury of the laws of the State of Washington that on August 15, 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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