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FILED

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LAW OFFICES

Michael Madden
Attorney
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June 5, 2014

Via Electronic Mail

The Honorable George Finkle (ret.)
Judicial Dispute Resolution
1425 Fourth Ave, Ste 300
Seattle, WA 98101

Re: In re Seattle Children's Hospital, OIC No. 13-0293

Dear Judge Finkle:

Carol Sue Janes and I represent Seattle Children's Hospital in this appeal. We are writing to raise an important preliminary issue. As you know, Chief Presiding Officer Patricia Petersen was removed from the matter after she complained that the Chief Deputy Insurance Commissioner had attempted to influence her to rule in favor of the Commissioner's position in this and other cases. After Ms. Petersen made these allegations, the OIC Staff submitted a document entitled "Rebuttal to Notice of Ex Parte Communication." See copy enclosed. This document does not actually rebut any of Ms. Petersen's factual allegations. Instead, it asserts the limited set of documents that Ms. Petersen placed in the record of this proceeding do not constitute "sufficient evidence" of "improper ex parte communication." Whether that conclusion is correct is in our view irrelevant given Ms. Petersen's removal.

What may be relevant is the assertion by the OIC Staff that Mr. Odiorne's alleged actions were permissible under RCW 34.05.455(1)(c).¹ That assertion, with which we strenuously disagree, may be relevant if the Commissioner is taking the position that he, or anyone acting at his direction, is permitted to communicate with you about the merits or disposition of this matter *ex parte*. As we read the delegation of authority and letter of appointment from the Commissioner, you are authorized to independently conduct all proceedings and to render a final decision on behalf of the OIC. We believe the law requires that the hearing be conducted without any *ex parte* input on the merits from the Commissioner or his staff.

¹ The OIC may have thought better of this position. According to the May 22, 2014 edition of the Puget Sound Business Journal, Commissioner Kreidler has said that Mr. Odiorne's behavior as described by Ms. Petersen "would not be appropriate." See copy enclosed.

The Honorable George Finkle

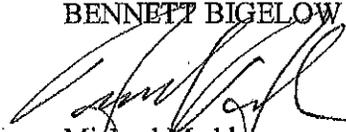
June 5, 2014

Page 2

If you feel otherwise, we ask to be informed of that disagreement at the outset, so that we can take appropriate action on behalf of our client. Please understand that we have the utmost respect for your integrity and diligence but feel compelled to make this inquiry given the circumstances.

Very truly yours,

BENNETT BIGELOW & LEEDOM, P.S.



Michael Madden

MM/ged

Enc:

Cc/enc:

Clients

Charles Brown

AnnaLisa Gellerman

Timothy J. Parker

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OFFICE OF
INSURANCE COMMISSIONER

2014 MAY 21 A 10:47

OIC HEARINGS UNIT
PATRICIA D. PETERSEN
CHIEF PRESIDING OFFICER

In the Matter of)
SEATTLE CHILDREN'S HOSPITAL,)
COPY RECEIVED)
TIME _____ BY _____)
MAY 22 2014)

NO. 13-0293)
REBUTTAL OF NOTICE)
OF RECEIPT OF EX PARTE)
COMMUNICATIONS BY)
PRESIDING OFFICER FROM)
AGENCY EMPLOYEE)

**BENNETT BIGELOW
& LEEDOM**

Pursuant to RCW 34.05.455, the undersigned submits this Rebuttal of the Notice of Receipt of Ex Parte Communications by Presiding Officer from Agency Employee (the Notice) that was filed in this matter by the Chief Presiding Judge on May 13, 2014. In the Notice, Judge Petersen alleges that her supervisor, OIC Chief Deputy Jim Odiorne, engaged in prohibited ex parte communications with her concerning this case dating back to August 2013. Notice, page 4, paragraph 2.

As an initial matter, according to the Notice, “[a]ll written ex parte communications from Mr. Odiorne to [Judge Petersen] are included in the hearing file as required by RCW 34.05.455(5).”¹ Id., page 5, paragraph 1. The Notice references several documents, however, which are not present in the hearing file. These include

¹ For ease of reference, the 5 documents contained in the hearing file are printed and attached to this document as Exhibit A, as follows:

- 12/03/13 MEMO RE Rules pertaining to communications with presiding officer (4 pages)
- WGS PDF for Patricia Petersen, updated August 12, 2012 by Mike Watson
- 8/20/12 Evaluation of Patricia Petersen by Watson/Kreidler for the period of 7/01/11 to 6/30/12
- Expectations for Patricia Petersen by Odiorne for the period of 7/1/13 to 6/30/14
- 2/26/14 email from Odiorne to Petersen re tone of decision

OIC Staff Rebuttal to Notice of Ex Parte Communication

Page 1

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Judge Petersen's May 2014 "work evaluation" (quoted in the Notice at page 5, paragraph 1), and "other written statements" (not otherwise specified, Notice at page 5, paragraph 1.) This Rebuttal relies on examination of the documents provided, and we respectfully request that documents cited but not available be provided in the record.

While the law generally prohibits ex parte contact between a presiding officer and persons employed by the agency, see RCW 34.05.455(1), there is an exemption for communication with agency employees who are not participants in the hearing.

Specifically,

Presiding officers may communicate with other employees or consultants of the agency who have not participated in the proceeding in any manner, and who are not engaged in any investigative or prosecutorial functions in the same or a factually related case."

RCW 34.05.455(1)(c).

Judge Petersen's "Notice" provides no evidence that Mr. Odiorne engaged in any investigative or prosecutorial functions in this case or in any factually related case, and the undersigned is aware of no evidence that would support such a claim. Mr. Odiorne has not appeared in this proceeding, and has not engaged in any investigative or prosecutorial functions related to the filing of the Regence and Premera Networks or the current appeal. As a result, under this exception to the ex parte prohibition, Judge Petersen was free to communicate with Mr. Odiorne about any issue she wished, and Mr. Odiorne was likewise free to communicate with Judge Petersen.

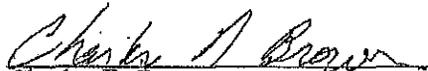
Moreover, as Judge Petersen's direct supervisor, Mr. Odiorne is obligated to discuss her performance as a Hearings Officer. See OIC Organizational Chart, Exhibit B. OIC's Performance Management policy requires, among other functions, that supervisors establish performance expectations, regularly communicate with the employee on areas

that need improvement, and provide a written evaluation at least annually. OIC Policy and Procedures Manual, Performance Management Program, Exhibit C. As stated in *Nash vs. Bowen*, 869 F.2d 675, 680 (2d Cir. 1988), with respect to the authority of the Secretary of Health and Human Services to supervise the ALJs who decide Social Security cases:

It is, after all, the Secretary who ultimately is authorized to make final decisions in benefit cases. *Baker v. Heckler*, 730 F.2d 1147, 1150 (8th Cir. 1984); cf. 42 U.S.C. § 4501(1) (authorizing Secretary to delegate his statutory powers to "any member, officer, or employee" of the agency). An ALJ is a creature of statute and, as such, is subordinate to the Secretary in matters of policy and interpretation of law. *Mullen v. Bowen*, 800 F.2d 535, 540-41 n.5 (6th Cir. 1986); *Association of ALJs*, 594 F. Supp. At 1141.

Upon examination, the documents submitted by Judge Petersen to support her claims of improper ex parte contacts appear to be appropriate supervisory communication. In fact, none of the documents contain any mention of the issues or merits of any specific case. Any evidence of impermissible ex parte conduct is founded solely in Judge Petersen's subjective and unsworn statements. As a result, we respectfully disagree that there is sufficient evidence upon which to find that Chief Deputy Odiorne has engaged in improper ex parte communication.

DATED this 21st day of May, 2014.


Charles D. Brown
Staff Attorney
Legal Affairs Division
Office of Insurance Commissioner

from the Puget Sound Business Journal

<http://www.bizjournals.com/seattle/blog/health-care-inc/2014/05/exclusive-kreidler-doesnt-relieve-whistleblower.html>

May 22, 2014, 2:05pm PDT Updated: May 22, 2014, 3:32pm PDT

Exclusive: Kreidler doesn't believe whistleblower judge, stands by deputy



Valerie Bauman

Staff Writer- *Puget Sound Business Journal*

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Washington State Insurance Commissioner Mike Kreidler says he doesn't believe the accusations a whistleblower judge made against his second-in-command — but he says the behavior she describes would be unacceptable.

Chief Presiding Officer Patricia Petersen, an administrative law judge, has accused James Odiome, Kreidler's deputy chief, of illegally trying to influence the outcome of cases she presides over that involve the Office of the Insurance Commissioner (OIC).

"It would not be appropriate," Kreidler told me Thursday in Spokane, where he's attending the state Health Benefit Exchange board's meeting. "And I don't believe for a second that that was done. I think what you have is a difference of interpretation. Anything he portrayed to her, I'm very confident in saying it was discussed and reviewed by the attorney general's office before it was done."

News broke late Wednesday that the OIC was hiring an independent investigator to look into Petersen's claims and her actions as well. The investigator will look into whether she inappropriately leaked documents related to a case pitting **Seattle Children's Hospital** against the insurance commissioner. The documents were emailed to an attorney for Children's.

Petersen was placed on paid leave May 14, but Kreidler said that wasn't done in retaliation for a whistleblower report she filed with the State Auditor's Office (SAO).

In fact, Kreidler said he wouldn't have removed Petersen at all if it weren't for her hesitation in answering when an attorney asked her if she had been the one to email him the documents in question.

In a May 14 pre-hearing conference call, Seattle Children's attorney Michael Madden is recorded asking: "I think it would be appropriate one way or the other for you to put in the record an indication whether that transmission was done at your direction or anyone acting on your behalf ... I think all of us are wondering."

"Um, uh, I'm not real familiar with that system," Petersen responded. "I don't actually know if that's a public document or not. What I'll do, I'll try to consult with someone who might know about that. What is your concern about that? And I would ask at this point, if you would not distribute that until we have a notion of how to handle that ... I can't answer that, I don't know how it escapes the office or the agency there."

Petersen had indicated she didn't know how the attorney obtained it, asking: "How was it acquired to send to you?"

That was the turning point, Kreidler said.

If that had not happened in the pre-hearing, then of course I would have taken no action relative to her reassignment or withdrawing her authority that had been granted to her as an administrative law judge," he said.

Petersen's report to the auditor's office alleged that Odiorne had engaged in a pattern of illegal communication and threats, instructing Petersen on how to rule in cases brought against the agency. At the time she was residing over the Seattle Children's Hospital case, among others, as state insurers and providers struggle with the rollout of the Affordable Care Act.

Odiorne is clearly threatening my job if I do not enter decisions in these cases which support the commissioner's position," Petersen wrote.

It remains unknown who sent Petersen's report anonymously from an **Office Depot** in Olympia hours after Petersen filed it on May 13. Next week the Office Depot employee who sent the email will submit to a deposition. Petersen's attorneys try to get to the bottom of the mystery.

Petersen was placed on leave May 14 and taken off all of her cases, including Children's. If she did leak the report, she would be guilty of the same offense she alleges Odiorne is guilty of – ex parte, which is illegal communication between two parties in legal proceedings.

The rapidly developing case has had a number of twists and turns. Kreidler says that early on, the OIC should have provided more information on why Petersen was placed on leave.

Unfortunately I didn't make it crystal clear right from the beginning that any issue related to filing a whistleblower complaint had absolutely nothing to do with the reason for having her reassigned and revoking her privileges as an administrative law judge," he said. "It has a lot to do with the ongoing investigation that we are going currently to make sure that there hasn't been inappropriate contact taking place."

The commissioner said he hasn't removed Odiorne after Petersen's allegations, because her claims didn't merit that action.

What would be the grounds for doing so when you have no reason to suspect that anything that was done that would warrant that action?" he said.

When asked why Petersen's accusations weren't enough, he added, "That's one person, that's one employee saying something."

Kreidler is standing by Odiorne, saying he believes the chief deputy's communication with Petersen was appropriate.

What was put forward (by Odiorne) was an opportunity to have a discussion, which is a routine function for an administrative law judge," Kreidler said. "That is not telling her how to rule in a case. That is certainly having a discussion behind her thinking on a case, with absolutely no impact whatsoever on the decisions she ultimately renders."

Kreidler urged the public to reserve judgment on Petersen and the OIC until all the facts come out.

Have patience enough to wait, for her sake and (for the sake of) the Office of the Insurance Commissioner, to give us time to do a real investigation," he said.

Valerie Bauman covers health care and the marijuana industry for the Puget Sound Business Journal.