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2014 AUG 18¹⁴ A 10:59
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STATE OF WASHINGTON
BEFORE THE WASHINGTON STATE
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of:

Seattle Children's Hospital Appeal of OIC's
Approvals of HBE Plan Filings.

Docket No. 13-0293

SEATTLE CHILDREN'S
HOSPITAL'S RESPONSE TO
INTERVENORS' MOTION IN
LIMINE RE TESTIMONY OF
ELIZABETH BERENDT

I. SUMMARY

Intervenors—but not the OIC—seek to exclude the testimony of former OIC Deputy Commissioner Elizabeth Berendt on the ground her testimony constitutes impermissible “assistance” to SCH under RCW 42.52.080(5). The motion should be denied for four independent reasons:

(1) RCW 42.52.060 provides, “This chapter does not prevent a state officer or state employee from giving testimony under oath.” This section applies to the entire chapter, and does not distinguish between current and former employees; the only sensible construction is that it applies to both. Otherwise, a former state employee who does no more than offer truthful testimony concerning events in which she was involved on behalf of the state commits an ethical violation if her testimony is deemed to “assist” a party adverse to the state.

(2) If offering factual testimony amounts to “assisting” SCH, the “transaction involving the state,” with respect to which Ms. Berendt is allegedly “assisting” is SCH’s appeal

filed 8-14-14

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(2) If offering factual testimony amounts to “assisting” SCH, the “transaction involving the state,” with respect to which Ms. Berendt is allegedly “assisting” is SCH’s appeal

ORIGINAL

from the OIC's July 31, 2013 approval of intervenors' QHPs. That "transaction" commenced on October 22, 2013, after Ms. Berendt left state employment.

(3) Even under their erroneous view that the relevant "transactions" were the OIC's approvals of their QHPs, the statutory definition of "transaction involving the state" and "participation," found in RCW 42.52.010 require the former employee to have "personally and substantially" participated in the "transaction" now pending, "through approval, disapproval, decision, recommendation, the rendering of advice, investigation, or otherwise." Here, it is undisputed Ms. Berendt was not responsible for the OIC "approval" or "decision" regarding intervenors' QHPs. Those were the acts of her successor—Molly Nollette—and Commissioner Kreidler. Although intervenors claim it is enough that Ms. Berendt "was responsible for supervising the analysts and managers who actually performed the regulatory review process," "supervising" does not equal "personally and substantially" participating in a transaction. Knowing this, intervenors further assert that Ms. Berendt "performed the network adequacy review for the Premera and LifeWise networks,"¹ citing the testimony of OIC staff members Jennifer Kreidler and Molly Nollette. In making this assertion, intervenors ignore the testimony of Ms. Berendt, who unequivocally states that Ms. Kreidler and others were responsible for the network reviews, which were not complete before she left her position; i.e., "I left, and so was not really involved in the hands-on, nor would I ever have been hands-on involved with reviewing the network directly."² Accordingly, even under intervenors' erroneous view of the law, the issue cannot be resolved without first determining whether Ms. Berendt personally and

¹ Motion at 2.

² Madden Decl. Ex. 1 (Berendt Dep. at 28, 20-25).

substantially participated in review and approval for intervenors' networks for purposes of their QHPs.³

(4) The motion is untimely. Ms. Berendt was listed as a potential witness for SCH on June 25, 2014 and deposed on July 17th. Under the Pre-Hearing Order in this matter, motion practice is governed by KCLR (b)(4)(a), which requires six court days notice for non-dispositive motions, and allows 3.5 court days for response. In order to disrupt SCH's hearing preparations, intervenors purposefully sat on this and their other motions in limine until after the August 8 deadline for such filings. For this reason alone, the motion should be denied.

II. FACTS

Intervenors' "Statement of the Facts" is inaccurate. Ms. Berendt's consulting engagement with SCH involves advising with regard to the OIC's proposed new network adequacy rules and how best to navigate the Benefit Level Exception process Premera has imposed on the hospital beginning January 1, 2014. Ms. Berendt did not participate in these matters while a state employee.⁴ The potential for Ms. Berendt to testify in this matter arose when it became apparent the intervenors—and perhaps the OIC staff—were going to claim no remedy is available for the inadequacy of intervenors' networks. At that point, SCH listed Ms. Berendt as a fact witness to testify concerning past remedial action by the OIC in similar circumstances.⁵

Notwithstanding this very limited endorsement, nearly the entirety of the questioning at Ms. Berendt's deposition, conducted by Premera primarily, concerned Ms. Berendt's role

³ As stated in State Ethics Board Board Advisory Opinion 97-06, cited by intervenors, "the question of participation is primary factual." Intervenors' one-sided version of the facts is not a sufficient basis to form any conclusion.

⁴ Madden Decl. Ex. 1 (Berendt Dep. at 10-11). Ms. Berendt's engagement with SCH regarding the new OIC adequacy rules commenced in October, 2013.

⁵ *Id.* at 16 (Berendt was requested to testify regarding "corrective action" by the OIC).

relative to various submissions by intervenors, some of which go back to 2012. From that questioning by Premera, to which both BridgeSpan and the OIC staff actually objected as beyond the scope of SCH's disclosure, it was apparent Ms. Berendt does not agree with Ms. Nollette's and Ms. Krietler's self-serving (and undocumented) assertions that she personally reviewed and approved the Premera/LifeWise networks and the BridgeSpan network.⁶ Recognizing her factual testimony jeopardizes the OIC's approvals, they now move to exclude it.⁷

III. ARGUMENT

A. **The Ethics in Public Service Act does not prevent testimony or authorize its exclusion.**

The Ethics in Public Service Act does not authorize exclusion of testimony. To the contrary, RCW 42.52.060 states, "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." The reference to "this chapter" is broad enough to include the provisions of RCW 42.52.080 pertaining to former state officer and employees, particularly when the public policy considerations, under the Act and otherwise, are considered. It makes no sense to say that testimony will not be deemed to violate the prohibition on current officers/employees assisting a person in transaction involving the state under RCW 42.52.040, while holding that it is a violation for the same employee to offer the same testimony on the day

⁶ *Id.* at 20 (network adequacy review performed by analysts who reported to managers, who reported to Ms. Berendt), 32 ("To be clear, the deputy commissioner of rates and forms does not review the networks for adequacy.").

⁷ In this regard, it worth noting that in the CCC case the former Chief Presiding Officer noted that the OIC had failed to present Ms. Berendt as a witness, thus handicapping itself with respect to showing why single case agreements were not an appropriate substitute for network inclusion. Ex. 109 at 9.

after he or she has retired. This construction is consistent with the important public policy disfavoring exclusion of relevant evidence.⁸

B. The relevant “transaction” is this appeal, in which Ms. Berendt did not “participate” as a state officer.

The Executive Ethics Board has recognized that a multi-stage process bearing on a single result may constitute multiple “transactions involving the state,” and that participation in one stage does not disqualify a former employee from assisting in another.⁹ The focus of Ms. Berendt’s consulting work for SCH has been on the OIC’s new network adequacy regulations and, to a lesser extent, SCH’s attempts to navigate the BLE process. These are matters in which she did not participate while with the OIC. This appeal by SCH under RCW 48.04.010 is an entirely separate “transaction involving the state,” *i.e.*, “a proceeding ... request for a ruling or other determination,” which is distinct from another “transaction” involving the state, *i.e.*, the QHP review process, which culminated in the OIC’s July 31, 2013 approvals of intervenors’ plans. SCH was not a party to the latter process, which is now completed.

C. Ms. Berendt did not “personally and substantially participate” in approval of intervenors’ QHPs.

Current OIC Rates & Forms Deputy Molly Nollette was the person responsible for approval of intervenors’ plans and networks on July 31, 2013.¹⁰ Ms. Berendt was not involved in the review process after June 26, 2013 and, as stated, denies any personal or substantial involvement in reviewing or approving the network submissions supporting intervenors’ QHPs.

⁸ See, e.g., *Lowy v. PeaceHealth*, 174 Wn. 2d 769, 785, 280 P.3d 1078 (2012) (“exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.”), citing *United States v. Nixon*, 418 U.S. 683, 709, 94 S. Ct. 3090, 3108, (1974) (“the public . . . has a right to every man’s evidence, except for those persons protected by a constitutional, common-law, or statutory privilege.”) (internal citations and quotations omitted).

⁹ Executive Ethics Board Advisory Opinion No. 98-02, available at <http://www.ethics.wa.gov/ADVISORIES/opinions/2013%20Updated%20Opinions/updated%20Advop%2098-02.htm> .

¹⁰ Madden Decl. Ex. 2 (Nollette Dep. at 17-18).

Accordingly, even under the view that the relevant transaction is the QHP approval, it cannot be said that Ms. Berendt “personally and substantially participated” in that transaction.

D. The motion is untimely.

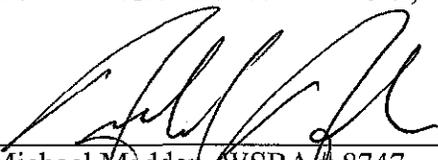
As explained above, this motion could and should have been submitted by August 8th, which would have allowed SCH six working days to prepare a response. Intervenors have not provided the slightest excuse for this act of gamesmanship.

IV. CONCLUSION

For the foregoing reasons, the Motion to Exclude Ms. Berendt’s testimony should be denied.

DATED this 14th day of August, 2014.

BENNETT BIGELOW & LEEDOM, P.S.

By 
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CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of this document on all parties or their counsel of record on the date below by hand delivery on today's date addressed to the following:

Presiding Officer

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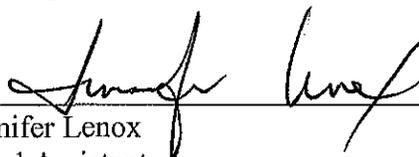
BridgeSpan Health Company

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Seattle, Washington, this 14th day of August, 2014.



Jennifer Lenox
Legal Assistant

{*0766.00018/M1086891.DOCX; 1}

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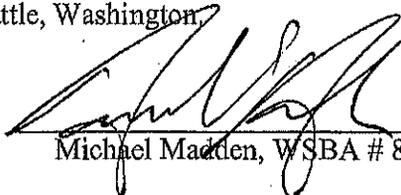
Docket No. 13-0293

DECLARATION OF MICHAEL
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INTERVENORS' MOTION IN
LIMINE RE TESTIMONY OF
ELIZABETH BERENDT

1. I am one of the attorneys for Seattle Children's Hospital ("SCH") in this matter. I have personal knowledge of the matters stated herein.
2. Attached hereto as Exhibit 1 are true and correct copies of the cover page and pages of the deposition of Elizabeth Berendt cited in SCH's Response to Intervenors' Motion in Limine to Exclude Testimony of Elizabeth Berendt.
3. Attached hereto as Exhibit 2 are true and correct copies of the cover page and pages of the deposition of Molly Nollette cited in SCH's Response to Intervenors' Motion in Limine to Exclude Testimony of Elizabeth Berendt.

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Dated this 14th day of August at Seattle, Washington.



Michael Madden, WSBA # 8747

filed 8/14/14

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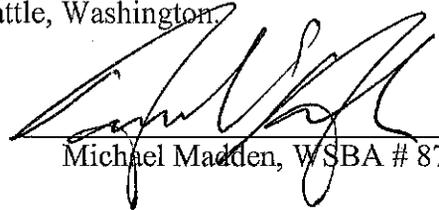
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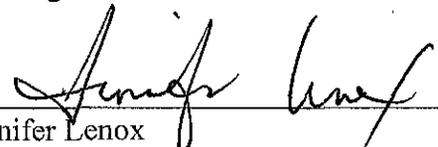
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Jennifer Lenox
Legal Assistant

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EXHIBIT 1

July 17, 2014

re Seattle Children's Hospital's Appeal of OIC's Approvals of HBE Plan Filings,

Elizabeth Berendt

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STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In re)
)
Seattle Children's Hospital's)
Appeal of OIC's Approvals of HBE)
Plan Filings,)

COPY

DOCKET NO. 13-0293

Deposition Upon Oral Examination
of
ELIZABETH BERENDT

1:30 P.M.

July 17, 2014

601 Union Street, Suite 1500

Seattle, Washington

Valerie L. Seaton, RPR, CCR



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MELISSA ANDERSON
JOHN PIERCE

THE COURT REPORTER:

VALERIE L. SEATON, RPR, CCR
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2033 Sixth Avenue
Suite 826
Seattle, Washington 98121
Valerie@MoburgReporting.com

1 Q. And you were asked whether Premera had
2 complied with all the regulations that you just told
3 me?

4 A. No, I was not asked that question. I was
5 asked what the requirements were, whether or not they
6 apply subject to the fact findings of the hearing
7 officer, and any other activity.

8 Q. What is your current employment?

9 A. I'm self-employed sole proprietor of Berendt
10 & Associates, LLC, providing regulatory consulting
11 services.

12 Q. And is Seattle Children's one of your clients?

13 A. Seattle Children's is one of my clients.

14 Q. When were you retained by Seattle Children's?

15 A. I believe our contract was effective on or
16 about October 11 of 2013.

17 Q. Did you bring any documents with you today in
18 response to a subpoena?

19 A. I have not received a subpoena.

20 MS. JANES: There was no subpoena for
21 today.

22 Q. (BY MS. PAYTON) Did you bring any documents?

23 A. I did not.

24 Q. And what were you retained by Children's to
25 do in October 11, 2013?

1 A. Seattle Children's hired me -- retained me to
2 provide input and advice on the development of the
3 network adequacy rule-mak- -- making activities that
4 had been undertaken by the insurance commissions
5 office?

6 Q. For 2015?

7 A. For the 2015 plan year.

8 Q. Did you work with Children's at all related
9 to the 2014 plan year?

10 A. I did not.

11 Q. Did you provide any advice to Children's at
12 all related to the requirement for the 2014 plan year?

13 A. Only in general terms of how the existing
14 rules apply to the 2014 plan year.

15 Q. And how they differ for the proposed rules
16 for 2015?

17 A. Well, the proposed rules were under
18 development and went through three or four significant
19 rewrites. And so in that capacity, I did analysis,
20 prepared analysis for Seattle Children's, made
21 recommendations on what comments to submit to the OIC,
22 and helped them prepare their written comments as part
23 of the administrative rules-making procedure.

24 Q. For 2015?

25 A. For the new network adequacy rules that were

1 "Regence," it could be one of basic regulated insurance
2 companies. And if there's a need for clarification,
3 I'll ask you.

4 Q. Okay. I'm not trying to belabor this. I was
5 actually trying to make it easier but apparently failed
6 at that.

7 So in that role as deputy commissioner, you
8 were responsible for the approval of the networks that
9 are currently in place for both Premera, LifeWise and
10 BridgeSpan's Exchange product, correct?

11 MS. JANES: Object to the form.

12 A. My division was responsible for the approval.
13 I would not necessarily, and, in fact, would rarely be
14 the person that would actually do the financial
15 approval. I provided the executive oversight.

16 Q. (BY MS. PAYTON) And who does the final
17 approval?

18 A. Well, one of the assigned analysts. So, for
19 example, in the area of networks, if it was a provider
20 contract, it would be the analyst that would be
21 assigned the authority and responsibility to review the
22 contract's compliance, they would approve it.

23 If it was the analyst that was signed for
24 network adequacy, they would do that review.

25 Q. But you had oversight over those analysts,

1 correct?

2 A. I was the executive with oversight. They did
3 report to managers.

4 Q. And you oversaw their work?

5 A. I oversaw the division, had delegated
6 authority to managers who supervise the work of the
7 analyst.

8 Q. Who is the analyst who was assigned to the
9 network adequacy issues related to Premera and LifeWise
10 for the 2014 Exchange plan year?

11 A. The 2014 Exchange filings were very
12 complicated and had several components. There were the
13 forms which were the policy contracts and provider
14 contracts, and the Premera analyst, primary analyst was
15 Jennifer Kreitler. But the forms were reviewed by all
16 of the health care analysts in a team. And then
17 Jennifer was responsible for generating the letters
18 back to Premera.

19 The rates were under the direction of
20 Liechou, L-I-E-C-H-O-U, Lee, L-E-E, and the analyst
21 working with her. And then there's a third component
22 that has a part of network and network adequacy and
23 essential community providers.

24 The shorthand term is this is the binder.
25 The binder is made up of templates that were developed

1 by the federal government and must be completed and
2 submitted. And I believe that Kelly Arnfield,
3 A-R-N-F-I-E-L-D, was accountable for reviewing and
4 approving the binder.

5 Q. So we have the forms, the rates and the
6 binder?

7 A. Correct.

8 Q. What else?

9 A. Well, and then there's the network which
10 includes the monthly Form A submission, which is the
11 list of providers. They're the provider contracts. So
12 very complicated.

13 Q. Which -- who was the analyst in charge of the
14 network?

15 A. My understanding is that at least before I
16 left, it was generally under the auspices of Jennifer
17 Kreitler. But in terms of the contents of the binder
18 which does indicate and include network information,
19 that was Kelly Arnfield.

20 Q. Is there any other category of review other
21 than the forms, the rates, the binder and the network
22 piece that you've told me about that went into the
23 approval of the 2014 Exchange product?

24 A. No.

25 Q. Okay. So let me first ask the same question

1 during your tenure where you did a preliminary approval
2 of the network?

3 A. For which company?

4 Q. For LifeWise and Premera.

5 A. No, I did not.

6 Q. So that work was still in progress when you
7 left?

8 A. Yes.

9 Q. Same question with respect to BridgeSpan.

10 Did you ever, during your tenure, reach a point where
11 you issued a preliminary or made a preliminary approval
12 of the BridgeSpan network for the 2014 Exchange plan?

13 A. The BridgeSpan network issue was different.
14 When there were preparations being made to get ready
15 for this onslaught of filings, the companies were
16 instructed in the summer of 2012 that if they were to
17 develop a new network for the Exchange product, that
18 they should target and be developing it at that time,
19 the summer of 2012, and that the network should be
20 complete by the end of fourth quarter 2012 in order to
21 provide enough time for analysis and leave the staff
22 available to do the review of the rates and the forms.

23 As a result, Premera, LifeWise immediately
24 began working on their network in the summer of 2012.
25 And by the end of the fourth quarter 2012, they were

1 well along their way of developing their network.

2 With respect to BridgeSpan, however, they did
3 not indicate they were going to develop a new network
4 until sometime the week before Thanksgiving in 2012.
5 They set up an appointment and came in to meet with me
6 and my staff to present their proposal for a new
7 network.

8 At that time, they were informed that it was
9 most likely too late, that they had not filed their
10 provider contracts for review yet, and that based on
11 the workload, that it was highly unlikely that they
12 would have their network approved in time for the 2014
13 filings.

14 They proceeded to file their provider
15 contracts. They met with me again, numerous phone
16 calls, and, in fact, they each went to the
17 commissioner. And consistently they heard that it was
18 too late to develop a new network and that they should
19 go with their commercial preferred network for 2014.

20 And that was the understanding throughout the
21 spring, that the Regence companies, including
22 BridgeSpan, would use their commercial preferred
23 network for network adequacy in 2014.

24 **Q. So when Premera LifeWise filed its**
25 **preliminary network for the 2014 Exchange plan in the**

1 to participating providers, providers under contract in
2 network, to deliver the services promised in the
3 contract.

4 Q. So how long were you directly involved in
5 those conversations with Premera Lifeline [sic]?

6 A. Those conversations were going on in the
7 summer of 2012 and early fall. At the same time, the
8 company filed for approval their contract forms for
9 review, and then the company went out and began
10 contracting efforts.

11 The final network -- we had hoped to get the
12 networks in across the board, as I mentioned, fourth
13 quarter of 2012, but there were significant delays, not
14 only for the new carriers, but for the existing
15 carriers. So we kept moving that date forward.

16 And finally, towards the end of my tenure
17 there, we said we will be reviewing the Form A, the
18 list of providers, that is submitted on June 10th to do
19 the final network analysis. So that was 16 days before
20 I left, and so was not really involved in the hands-on,
21 nor would I ever have been hands-on involved with
22 reviewing the network directly.

23 Q. And, in fact, those contract forms that
24 Premera filed in 2012 that you had been in discussion
25 with were not the contract forms that were actually

EXHIBIT 2

July 18, 2014

IN RE: SEATTLE CHILDREN'S HOSPITAL

Molly Nollette

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STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In re)

COPY

Seattle Children's Hospital's) DOCKET NO. 13-0293
Appeal of OIC's Approvals of HBE)
Plan Filings,)

Deposition Upon Oral Examination

of

MOLLY NOLLETTE

9:03 A.M.

July 18, 2014

5000 Capitol Boulevard

Tumwater, Washington

Valerie L. Seaton, RPR, CCR



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1 promulgated back in 2001 by the insurance
2 commissioner's office.

3 And what you can see is it's not -- I didn't
4 have a printed copy of the rule as existed up until
5 spring of this year. I had to go back to the source,
6 so this may not be the handiest way to read it, but
7 just have a couple of questions about it.

8 This is the rule, is it not, that the OIC
9 applied to during the review of the BridgeSpan and
10 Premera Exchange plans for plan year 2014?

11 A. I'd only assume that it is. I don't
12 recognize this format.

13 Q. Okay.

14 A. I will take your word for it.

15 Q. Well, not everyone may, but thank you.

16 Was it the OIC's position during the 2013
17 review process that covered services were required to
18 be provided by network providers if those providers
19 were available?

20 MR. PARKER: Object to the form.

21 A. I'm not entirely sure what you mean.

22 Q. (BY MR. MADDEN) Sure. Let me actually back
23 up and ask a predicate question.

24 You were the rates and forms deputy at the
25 time that the BridgeSpan and Premera plans were

1 approved in 2013; is that right?

2 A. Yes, I was.

3 Q. And were you the person responsible for that
4 approval?

5 A. The approval of the rates and forms?

6 Q. Yes.

7 A. Yes.

8 Q. Okay. And that approval included the
9 approval of network adequacy?

10 A. Yes, it did.

11 Q. Okay. So what I want to ask with reference
12 to your decision-making process for the BridgeSpan and
13 Premera plans is whether it was your view that covered
14 services under those plans had to be provided by
15 in-network providers where those providers were
16 available?

17 MR. PARKER: Object to the form.

18 A. I'm still not entirely sure what you mean.
19 Do you mean available as were available as in
20 contracted network work? I'm sorry. I'm having
21 trouble parsing the question.

22 Q. (BY MR. MADDEN) Yeah. So what I mean is
23 where they're geographically available within the
24 service area.

25 MR. PARKER: Object to the form.