

FILED

20
2015 NOV 23 P 12:14
KAM

HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

BEFORE THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

IN THE MATTER OF

KAISER FOUNDATION HEALTH PLAN
OF THE NORTHWEST

Docket No. 15-0205

REPLY IN SUPPORT OF KFHPNW'S
MOTION FOR SUMMARY
JUDGMENT

A. KFHPNW's Demand for Hearing is Not Time-Barred

The Office of the Insurance Commissioner ("OIC") grounds its opposition to Kaiser Foundation Health Plan of the Northwest's ("KFHPNW's") Motion for Summary Judgment on alleged timeliness issues that are simply not applicable. KFHPNW argued this issue in detail in its Opposition to the OIC's Motion in Limine (11/13/15), and those arguments are incorporated herein.

The OIC's April 1, 2015 objection letter ("the Objection Letter") in the System for Electronic Rate and Form Filings ("SERFF") did not constitute a final written order that would trigger the 90-day appeal deadline set forth in RCW 48.04.010(3). *See* Opp. to OIC's Motion in Limine. The OIC argues that "[a] disposition within SERFF . . . is a final order and must be appealed with [sic] ninety (90) days." OIC's Response to Kaiser's Motion for Summary for Summary Judgment (11/13/15) ("OIC's Response"), p. 8. In support of that contention, the OIC relies on an order granting the OIC's motion for summary judgment in connection with a

REPLY IN SUPPORT OF KFHPNW'S MOTION FOR SUMMARY JUDGMENT - 1

1 challenge by consumers to a long-term care plan premium rate increase approved by the OIC.
2 *In the Matter of Driscoll*, Docket No. 14-0187 (Order on OIC Staff's Motion for Summary
3 Judgment (01/23/15)).¹ In that case, "the OIC gave final approval of the rate increase filing and
4 associated forms, and such Disposition was entered and posted," but the aggrieved parties did not
5 submit a Demand for Hearing for nearly three years after receiving notice of that final approval.
6 *Id.* at 5 (emphasis added). That ruling does not stand for the broad proposition that every
7 objection letter or communication entered in SERFF constitutes a final written order. *See id.* In
8 addition, unlike a final rate approval, the Objection Letter did not involve a final determination
9 of legal rights; on its face, it invited continuing discussions on the subject between KFHPNW
10 and the OIC. *See* Declaration of Linda Broyles in Support of Response and Opposition to
11 KFHPNW's Motion to Stay (10/09/15), Ex. 7, p. 40.

12 Neither was there any statement or action that indicated to KFHPNW that its large group
13 plans were suspended, as the OIC suddenly now claims. *See* OIC's Response, p. 8. The first
14 time KFHPNW heard the Objection Letter characterized as a suspension of its plans was within
15 the OIC's Motion in Limine of October 30, 2015. Declaration of Megan Lane in Support of
16 KFHPNW's Opposition to OIC's Motion in Limine (11/13/15), ¶ 4. Had the OIC intended to
17 suspend the plans on April 1, 2015, it stands to reason that it would have provided KFHPNW
18 with clear and definitive notice to that effect.

19 RCW 48.04.010 is clear that an aggrieved party must be provided the opportunity to have
20 its challenges to any act or omission of the Commissioner heard by the Presiding Officer.²
21 RCW 48.04.010(1). Ruling that KFHPNW's demand for hearing in this case was somehow

22 ¹ *See* [http://www.insurance.wa.gov/laws-rules/administrative-hearings/judicial-
23 proceedings/documents/14-0187-order-summary-judgment.pdf](http://www.insurance.wa.gov/laws-rules/administrative-hearings/judicial-proceedings/documents/14-0187-order-summary-judgment.pdf) (last visited 11/19/15).

24 ² Notably, while a party's right to have his or her demand for hearing is deemed to have
25 been waived where the party does not file a demand for hearing within ninety days after notice of
26 a written order, the Presiding Officer may nevertheless hold a hearing at his discretion "for any
purpose within the scope of this code as he or she may deem necessary." RCW 48.04.010(1).
Even if the objection letter had constituted a final written order, which it did not, there is no
jurisdictional bar to having this matter heard, as the statute affords the Presiding Officer broad
discretion to hear issues related to the Code.

REPLY IN SUPPORT OF KFHPNW'S MOTION FOR SUMMARY JUDGMENT - 2

1 time-barred would not comport with the spirit or purpose of the statute. Critically, even where it
2 applies, the time limit for filing a demand for hearing does not expire until “ninety days after
3 receiving notice of such order . . .” RCW 48.04.010(3) (emphasis added). It would be contrary
4 to that requirement and patently inequitable to apply the 90-day time limit under circumstances
5 where it was far from clear that the OIC’s SERFF correspondence (expressly inviting further
6 discussion from KFHPNW) was somehow intended to be a final disposition on the merits of any
7 issue.

8 Nor did KFHPNW in any way “withdraw” an “appeal” of any issues raised in the
9 Objection Letter or otherwise concede the correctness of the OIC’s position. *See* OIC’s
10 Response, p. 8. Curiously, the OIC argues both that KFHPNW failed to timely appeal the
11 Objection Letter, which it wrongly characterizes as a final written order, and that KFHPNW in
12 fact did appeal, then withdrew its appeal. Both statements are inaccurate. As articulated above,
13 there was no final written order, triggering the 90-day time limit, prior to the Cease and Desist
14 Order. Moreover, while KFHPNW disagreed and engaged in discussions with the OIC about the
15 application of the service area definition to its large group plans, KFHPNW never formally
16 “appealed,” and would have had no reason to appeal in light of the ongoing discussions and the
17 absence of a final order.

18 The OIC continues to mischaracterize KFHPNW’s cooperation with the OIC’s direction
19 to revise its service area designation. Contrary to the OIC’s characterization, at no time did
20 KFHPNW indicate agreement with the OIC’s interpretation and application of the service area
21 definition or a concession as to the merits of its current challenge. KFHPNW simply made the
22 determination to comply with the OIC’s direction for the immediate future, while continuing to
23 discuss with the OIC staff its concerns and the basis for its disagreement with the OIC’s
24 interpretation. As delineated in detail in KFHPNW’s Motion for Summary Judgment, and as
25 undisputed by the OIC, the parties continued to engage in substantive discussions on those issues
26 in the ensuing months and until the OIC’s sudden and surprising issuance of its Cease and Desist

REPLY IN SUPPORT OF KFHPNW’S MOTION FOR SUMMARY JUDGMENT - 3

1 Order. In attempting to act in a cooperative manner and to reach a mutually-agreeable resolution
2 and receive the OIC's guidance as to the service area issue, KFHPNW did not somehow waive
3 its right to voice its position in these proceedings once the OIC brought an abrupt end to the
4 cooperative discussions that were occurring prior any litigation.

5 **B. The Revised Definition of Service Area Does Not Apply to Large Group Plans**

6 Significantly, the OIC does not contest any of the facts set forth in KFHPNW's Motion
7 for Summary Judgment. Instead, the OIC relies entirely on its faulty argument that KFHPNW's
8 "arguments are untimely." OIC's Response, p. 1. As discussed above and in KFHPNW's
9 Opposition to OIC's Motion in Limine, the OIC's timeliness argument fails.

10 As a seeming side note, the OIC asserts that the revised service area definition applies to
11 large group plans and raises the entirely new argument that KFHPNW has violated its own
12 Access Plan -- an allegation that the OIC did not include in its Cease and Desist Order.
13 Significantly, the Access Plan does not include a description of the service area, so it is unclear
14 what the OIC is relying upon in making this argument.

15 Much of the OIC's introductory discussion is comprised of its articulation of policy
16 considerations. The OIC offers, among other things, an explanation of the history of the agency
17 and the general development of the current network access regulations. To the extent that
18 discussion has any bearing at all on the Motion at hand, the policy considerations cited by the
19 OIC are not implicated by this matter, and the concerns the network access regulations were
20 developed to combat are similarly not present. Indeed, aside from the definition of the service
21 area that is the basis of this dispute, there is and has never been any indication that KFHPNW's
22 networks do not satisfy both the letter and the intent of the various network access regulations
23 the OIC cites. There is no indication that enrollees of KFHPNW's health plans are not able to
24 "access the care they need," or that KFHPNW's networks lack "enough types and number of
25 doctors within a reasonable distance." OIC's Response, p. 2. Indeed, KFHPNW is aware of no
26

1 instance in which an enrollee in one of its large group plans has complained that he or she was
2 unable to obtain reasonable access to medical care.

3 The OIC suggests that consumers are somehow at risk because the OIC “has not
4 evaluated [KFHPNW’s large group plans] for network accessibility.” *Id.* at 3. That assertion is,
5 at best, misleading. First, KFHPNW’s large group plans at issue are not brand new plans that
6 have managed to escape the OIC’s scrutiny due to their geographical boundaries. On the
7 contrary, the OIC has reviewed the Evidence of Coverage documents for the plans -- which
8 cover the same geographic area as is at issue here -- and raised no service area-based objections.

9 The OIC’s practice of reviewing plans for network access is also not new; the related regulations
10 have simply been revised. Surely the OIC does not mean to imply that its previous reviews for
11 network access were inadequate because the service area did not align with its revised service
12 area definition, or because such reviews occurred pursuant to earlier yet fundamentally similar
13 regulations.

14 The OIC further states that “every issuer’s service area must be defined by county or
15 counties so that each issuer’s network can be properly evaluated to ensure reasonable access to
16 care for enrollees, and to ensure that all issuers receive the same evaluation.” *Id.* at 2. The
17 purported concern for uniformity of review across issuers has, to KFHPNW’s knowledge, not
18 previously been articulated by the OIC, and is not referenced in the regulations cited by the OIC
19 in support of that proposition. In any event, it is unclear why a thorough and fair review cannot
20 occur regardless of the service area definition. If the OIC’s contention were accepted as true, it
21 would mean that the OIC’s prior zip-code-based definition of service area resulted in inadequate
22 or unfair network evaluations, which is not the case.

23 While the above policy considerations -- none of which are implicated by the
24 circumstances at hand -- comprise the bulk of the OIC’s Response, they miss the main point
25 articulated in KFHPNW’s Motion: that the revised definition of “service area” contained in
26 WAC 284-43-130(29) does not, given its context and the history leading to its implementation,

REPLY IN SUPPORT OF KFHPNW’S MOTION FOR SUMMARY JUDGMENT - 5

1 apply to large group plans. *See* KFHPNW’s Motion for Summary Judgment. The OIC simply
2 asserts, with little analysis, that the definition is intended to apply to large group plans. But the
3 regulation is not, as the OIC contends, clear on its face. To the contrary, WAC 284-43-130
4 provides that the definitions contained therein apply “unless the context requires otherwise.”
5 WAC 284-43-130 (emphasis added). Here, the context requires otherwise, as the service area
6 revision was implemented for the purpose of aligning state regulations with federal standards
7 that do not apply to large group plans. *See* KFHPNW’s Motion for Summary Judgment.

8 The OIC insinuates that was not the case through its contention that KFHPNW was aware
9 of the OIC’s intended application of the service area definition to large group plans during the
10 2013-14 network access rulemaking. The OIC specifically points to KFHPNW’s comment
11 letter, in which KFHPNW explained the unique characteristics of and considerations regarding
12 integrated delivery systems. OIC’s Response, p. 6. But KFHPNW’s comment letter signaled no
13 such understanding, as integrated delivery systems and large group plans are not the same thing
14 and do not necessarily present the same policy considerations.³

15 KFHPNW does not dispute that it eventually became aware of the OIC’s current position
16 on the applicability of the definition through a series of discussions and correspondence with the
17 OIC beginning in April 2015. KFHPNW similarly acknowledges that it acquiesced in the OIC’s
18 requests that it modify its service area description to conform to the OIC’s position, but at no
19 time did KFHPNW concede that the OIC’s position was correct or waive its right to challenge
20 such interpretation or the OIC’s application of the service area definition to its large group plans.
21 KFHPNW’s cooperation with the OIC did not constitute a waiver of the underlying challenge to
22 application of the service area definition. In any event, the OIC’s focus on KFHPNW’s
23 awareness of its position misses the main point: the OIC continued to engage in discussions with

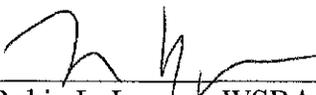
24 ³ The OIC also noted KFHPNW’s request that the proposed service area definition be
25 revised to remove the phrase “within this state” to reflect the fact that some plans cross state
26 lines. OIC’s Response, p. 6. If anything, this request reflects KFHPNW’s belief - and the OIC’s
acknowledgment, in granting KFHPNW’s request - that a plan’s service area, in some cases, may
extend beyond artificial county boundaries within a state.

1 KFHPNW about the service area definition long after it articulated its position, thereby, at a
2 minimum, signaling an amenability to reconsideration or flexibility. It is puzzling that the OIC
3 continued to engage in such discussions if the rule and the OIC's application of the rule was as
4 ironclad as the OIC now asserts. Contrary to the OIC's current posture, the context -- including
5 the OIC's own undisputed conduct and representations to KFHPNW -- demonstrates that the
6 service area definition is not applicable to large group plans.

7 For the reasons set forth above and in KFHPNW's initial memorandum, KFHPNW
8 respectfully requests that the Presiding Officer grant its Motion for Summary Judgment.

9 Dated this 20th day of November, 2015.

10
11 STOEL RIVES LLP

12 
13 _____
14 Robin L. Larmer, WSBA #46289
15 Karin D. Jones, WSBA # 42406
16 600 University St., Ste. 3600
17 Seattle, WA 98101
18 Phone: (206) 624-0900
19 Facsimile: (206) 386-7500
20 Email: robin.larmer@stoel.com
21 Email: karin.jones@stoel.com

22
23
24
25
26
Attorneys for KFHPNW

REPLY IN SUPPORT OF KFHPNW'S MOTION FOR SUMMARY JUDGMENT - 7

1 **CERTIFICATE OF SERVICE**

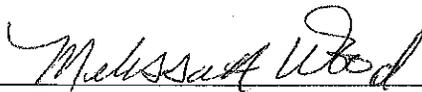
2 I, Melissa Wood, certify that at all times mentioned herein, I was and am a resident of the
3 state of Washington, over the age of eighteen years, not a party to the proceeding or interested
4 therein, and competent to be a witness therein. My business address is that of Stoel Rives LLP,
5 3600 One Union Square, 600 University Street, Seattle, Washington 98101.

6 On November 20, 2015, I caused a copy of the foregoing document to be served upon the
7 following individual(s) in the manner indicated below:

8
9 Hearings Unit hand delivery
10 Office of the Insurance Commissioner facsimile transmission
11 P.O. Box 40255 overnight delivery
Olympia, WA 98504-0255 first class mail
Email: hearings@oic.wa.gov e-mail delivery

12 Mandy Weeks hand delivery
13 Office of the Insurance Commissioner facsimile transmission
14 P.O. Box 40255 overnight delivery
Olympia, WA 98504-0255 first class mail
Email: MandyW@oic.wa.gov e-mail delivery

15
16 Executed on November 20, 2015, at Seattle, Washington.

17
18 
19 _____
Melissa Wood, Practice Assistant