

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

FILED

2015 NOV -6 P 1:38

In the Matter of)
)
KAISER FOUNDATION HEALTH)
PLAN OF THE NORTHWEST,)
)
Authorized Health Care Service Contractor.)

Docket No. 15-0205
ORDER ON KAISER FOUNDATION
HEALTH PLAN OF THE
NORTHWEST'S MOTION FOR STAY
OF CEASE AND DESIST ORDER

HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

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1. This comes before me on a Motion for Stay of Cease and Desist Order (Motion), filed by Kaiser Foundation Health Plan of the Northwest ("Kaiser") on September 25, 2015. I have considered Kaiser's Motion, the Office of Insurance Commissioner's ("OIC") Response and Opposition to the Motion ("Response"), filed October 9, 2015, Kaiser's Reply in Support of its Motion for Stay of Cease and Desist Order ("Reply"), filed October 16, 2015, and all supporting declarations and attachments.

Background

2. On September 2, 2015, the OIC issued an Order to Cease and Desist, No. 15-0205 ("Order"), to Kaiser, ordering Kaiser to immediately cease and desist from:

- Offering, selling, or renewing any plans to any consumer that neither lives nor works in Kaiser's service area of Clark and Cowlitz counties;
- By December 31, 2015, providing coverage to current enrollees that neither live nor work in Clark and Cowlitz counties.

3. The Order also mandated that before September 16, 2015, Kaiser report to the OIC the following information concerning plans offered or sold to consumers who neither live nor work in Clark and Cowlitz counties: the number of plans offered or sold; number of enrollees in such plans; the premiums charged enrollees; and an estimate of all current out-of-pocket expenses incurred by such enrollees to date. The Order also required that Kaiser draft a lawful discontinuation notice of such plans, and submit such draft to the OIC for approval, informing such enrollees that on December 31, 2015 their coverage would cease. Following OIC approval, Kaiser would timely issue such notice to enrollees.

4. On September 25, 2015, Kaiser submitted a Demand for Hearing (Demand) challenging the Order. Kaiser argues that the Order is disruptive and harmful to enrollees of its health plans, since many of them are enrolled through June 2016. Kaiser notes that since the Order requires them to discontinue by December 31, 2015 plans for members who neither live nor work in Clark or Cowlitz, this would cause significant disruption and hardship to such members and their employers, who may not have an alternative health plan. Kaiser also argues that the Order is overbroad in that it requires Kaiser to send discontinuation notices directly to 590 members because they have an address outside Kaiser's service area, even though several of those members may still be eligible for coverage because they work inside the service area. Kaiser also argues that, aside from the definition of "service area" in WAC 284-43-130(29), which it reasons the OIC erroneously applies to large group plans such as theirs, its plans afford members access to adequate health care. Finally, Kaiser argues that contrary to what is stated in the Order, its plans comply with the statutory requirement that its members have access to appropriate health care services (RCW 48.43.515), and the general network access regulation (WAC 284-43-200).

Authority to Grant Stay

5. RCW 48.02.080(3)(a) states if the Commissioner has cause to believe that any person is violating or is about to violate any provision of this code, or any regulation or order of the Commissioner, he or she may issue a cease and desist order (e.g., Order).

6. RCW 48.04.020(2) provides the Commissioner may authorize a stay of action taken by him or her (e.g., Order). WAC 284-02-070(2)(d)(i) states in part: "The commissioner may appoint a chief presiding officer who will have primary responsibility for the conduct of hearings, the procedural matters preliminary thereto, and the preservation of hearing records." (Emphasis added). Deciding whether to grant a stay is a preliminary procedural matter. Black's Law Dictionary, 1453 (8th Ed.) defines "stay," in part, as: "1: The postponement or halting of a proceeding, judgment, or the like."

Standard to Apply in Deciding Whether to Grant Stay

7. In its Response, at 7:12 through 9:21, the OIC applies the heightened standard for granting a stay set out in RCW 34.05.550(3). However, this provision concerns a scenario wherein an agency takes action based upon health, safety, or welfare grounds, and then the recipient of that action asks the court to issue a stay. Only then should the factors in RCW 34.05.550(3)(a)-(d) be applied. See also 641 Wash. L. Rev. at 822 ("Where agency action is based on 'public health,

safety, or welfare grounds,' the power of courts to grant stays is sharply limited by the [APA.]). RCW 34.05.550(3) is inapplicable to Kaiser's Motion.

8. While RCW 48.04.020(2) authorizes me to grant a stay of the Order during the pendency of proceedings before the OIC, this provision does not list criteria to apply in deciding whether to grant a stay. That said, I would agree with Kaiser's general statement at 2:21 of its Reply: "Nothing removes the decision to grant a stay from the Presiding Officer's full discretion. . . ." We therefore look to the common law for guidance.

9. A stay is not a matter of right, but an exercise of judicial discretion. *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926). In *In re Koome*, 82 Wn.2d 816, 818, 514 P.2d 520 (1973) the Court stated: "A stay order finds its genesis in the writ of supersedeas, originally an auxiliary process designed to supersede enforcement of judgment or order brought up for review, thereby maintaining the status quo and preserving the fruits of the appeal should it prove successful." Where a court is "sufficiently convinced that a stay is necessary to avoid undue prejudice to a party's prosecution [or defense] of a matter," a discretionary stay may be warranted. In *In re Marriage of Herridge*, 169 Wn. App. 290, 279 P.3d 956 (2012). In *State v. Longo*, 185 Wn. App. 804, 812, 343 P.3d 378 (2015), rev. denied 183 Wn.2d 1012 (2015), the court added: "The party requesting a stay must make out a clear case of hardship or inequity in being required to go forward." This standard is not dissimilar from the one Kaiser advocates for at 2:22-24 of its Reply wherein it states: "[Kaiser] respectfully asserts that the Presiding Officer's decision should be founded on an equitable weighing of the interests at stake."

Analysis

10. Jennifer Kreitler (Kreitler), Healthcare Consumer Access Manager for the OIC's Rates and Forms Division, states in part in her Declaration in support of OIC's Response:

To the OIC's knowledge [Bonneville Hotsprings Resort's large group health plan] is Kaiser's only large group plan that does not have a plan year renewal date on December 31, 2015, which is when the Order to Cease and Desist requires all plans offered to enrollees who do not live or work in Kaiser's service area to end. Only the members of the Bonneville Hotsprings Resort large group health plan who did not qualify by living or working inside of Clark or Cowlitz county (sic), which totals twenty-three people, will receive a mid-year termination.

Kreitler Declaration, ¶ 10 (brackets added). This statement is reiterated in OIC's Response at 5:3-6 and 8 n.5.

11. In its Reply Kaiser asserts several times that requiring mid-contract cancellation of coverage of large group health plans it administers will create significant disruption, confusion, and frustration. See Reply at 3:5-7, 6:8-10, 7:5-8, and 7:16-18. Maryann Schwab, Kaiser's Regional Compliance Officer, also asserts that to require Kaiser to cancel coverage for employees and their families mid-contract will lead to significant disruption, confusion, and frustration. Declaration of Maryann Schwab, ¶ 6. However, at no time does Kaiser refute Kreitler's statement

on behalf of OIC that amongst plans that Kaiser administers, only the Bonneville Hotsprings Resort (Bonneville) large group health plan will require a termination on December 31, 2015 (i.e., mid-contract). This is significant since the primary basis upon which Kaiser argues for a stay is that alleged multiple mid-contract terminations of plans will affect both its business and its reputation, and that multiple enrollees in such plans will have to scramble to secure alternative coverage.

12. In 2014, Kaiser filed its rates and forms for health plans renewing on or after January 1, 2015, through NAIC's¹ System for Electronic Rate and Form Filing (SERFF). Linda Broyles Declaration, ¶ 5. On April 1, 2015, OIC advised Kaiser that its plans allegedly improperly defined their service area per WAC 284-43-130(29) by zip code, as opposed to by county. *Id.* at ¶ 7. On May 11, 2015, OIC provided Kaiser with detailed information about the definition of service area and its application to large group plans, and that Kaiser could request that its service area be expanded to add other counties besides Clark and Cowlitz counties, or request a service area limitation if it demonstrated good cause. Declaration of Kreidler, ¶ 8. On May 27, 2015, Kaiser advised OIC that it would be correcting the definition of service area in its health plans to reflect its service area of Clark and Cowlitz counties. *Id.* at ¶ 9. On June 1, 2015, Kaiser renewed the Bonneville large group health plan which contained the disputed definition of service area (i.e., by zip code). *Id.* at ¶ 10. In July 2015 Kaiser informed OIC that the plan it administered through Public Employees Benefits Board (PEBB) also covered enrollees who did not live or work within Clark or Cowlitz counties. *Id.* at ¶ 11.

13. The evidence demonstrates that as early as April 1, 2015, Kaiser was on notice that OIC had concerns about Kaiser's filings through SERFF, and that the definition of service area in plans filed was a key point of contention. While Kaiser did provide Bonneville with a quote for a plan as early as February 19, 2015, prior to the objections raised by OIC, it was not until May 7, 2015, or after OIC's objections to Kaiser's SERFF filings, that Bonneville accepted the quote and a contract between Kaiser and Bonneville was created. See Reply, 5:4-5, and Declaration of Megan A. Lane in Support of Kaiser's Motion, ¶ 5.

14. The evidence demonstrates that per the Order only enrollees in the group health plan Kaiser sold to Bonneville will be involved in a mid-contract termination on December 31, 2015. Kaiser does not refute this. In addition, the evidence also shows that prior to renewing its contract with Bonneville on June 1, 2015, Kaiser had a period of time following receipt of OIC's objections to its SERFF filings, or April 1, 2015, through May 7, 2015 (when Bonneville accepted the quote), to change course with Bonneville. Kaiser chose not to. Rather, following discussions with OIC, on May 27, 2015 Kaiser informed the OIC that it would be correcting the definition of service area in its group health plans to reflect a service area of Clark and Cowlitz counties. Following this, OIC learned that Kaiser renewed its plan with Bonneville that contained the uncorrected definition of service area, and that Kaiser administered another group health plan for the benefit of public employees that did not coincide with OIC's view of the definition of service area. OIC then issued the Order.

¹ NAIC is the acronym for National Association of Insurance Commissioners.

15. The Order's mandate that by December 31, 2015 Kaiser cease and desist providing coverage to current enrollees of plans who neither live nor work in Clark and Cowlitz counties raises another issue for Kaiser. In its Motion at 5:18-25, and the Declaration of Maryann Schwab at ¶¶ 5, 9, Kaiser alleges that it lacks sufficient data as to 79 of the 81 plans it administers for policyholders located in Clark and Cowlitz counties, and specifically whether 590 employees enrolled in such plans not living in Clark or Cowlitz counties actually work in those counties. Therefore, Kaiser argues that to abide by the Order it will be forced to cancel coverage for those enrollees of all such plans. Kaiser also asserts at 6:23 of its Reply that OIC has not offered any evidence to support the conclusion that enrollees outside Kaiser's service area (as defined by OIC) will actually lack access to an adequate network of medical providers within a short distance of where they work or reside. Essentially, Kaiser argues that since the OIC allegedly has no evidence that enrollees located outside of Kaiser's service area (as defined by OIC) do not have access to an adequate network, that Kaiser is legally serving enrollees outside its service area (as defined by OIC). This begs the question. RCW 48.43.515 mandates that each enrollee in a Kaiser health plan have adequate choice among health care providers. Additionally, WAC 284-43-200 requires that Kaiser maintain each provider network for each health plan in a manner that is sufficient to ensure that all health plan services provided to enrollees are accessible in a timely manner. Given these statutory and regulatory mandates, any inconvenience Kaiser may experience in notifying enrollees in its plans that their coverage will be discontinued does not warrant that the Order be stayed.

16. I conclude that a stay is not necessary in this matter to avoid undue prejudice to Kaiser's opposition to the Order (i.e., Demand), especially since Kaiser informed OIC on April 27, 2015, long before the Demand filed in this case, that it would be correcting the definition of service area in its group health plans per OIC's objections to its SERFF filings. This status quo does not diminish legal arguments Kaiser makes in its Demand. Additionally, Kaiser has not shown a clear case of hardship or inequity in being required to comply with the Order, since the evidence shows that only enrollees in one of its plans (involving Bonneville) will be subject to a mid-contract termination, and state law mandates that networks enrollees belong to be adequate. Per the standard articulated in *Koome*, *Herridge*, and *Longo*, a discretionary stay is not warranted in this case.

ORDER

Kaiser's Motion for Stay of the Order is denied.

Dated: November 6, 2015



WILLIAM PARDEE
Presiding Officer

Declaration of Mailing

I declare under penalty of perjury under the laws of the State of Washington that on the date listed below, I mailed or caused delivery through normal office mailing custom, a true copy of this document to the following people at their addresses listed above: Robin L. Larmer, Karin D. Jones, Mike Kreidler, James T. Odiorne, J.D., CPA, AnnaLisa Gellermann and Mandy Weeks.

DATED this 10th day of November, 2015.



KELLY A. CAIRNS