

MIKE KREIDLER
STATE INSURANCE COMMISSIONER

STATE OF WASHINGTON



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HEARINGS UNIT
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BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of)	Docket No. 13-0293
)	
Seattle Children's Hospital,)	NOTICE OF RECEIPT OF
)	EX PARTE COMMUNICATIONS
A Washington Not-For-Profit Corporation,)	BY PRESIDING OFFICER FROM
)	AGENCY EMPLOYEE
and)	
)	
Bridgespan Health Company, a Health)	
Services Contractor; and Premera Blue)	
Cross, a Health Services Contractor,)	
)	
Intervenors.)	

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COPY TO: Mike Kreidler, Insurance Commissioner
James T. Odiorne, J.D., CPA, Chief Deputy Insurance Commissioner
Molly Nollette, Deputy Commissioner, Rates and Forms Division
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NATURE OF PROCEEDING

On October 22, 2013, Seattle Children's Hospital ("SCH") filed a Demand for Hearing to contest the Insurance Commissioner's ("OIC") approvals of the individual market Exchange filings of Coordinated Care Corporation, Molina Healthcare of Washington, Inc., Premera Blue Cross and Bridgespan Health Company. Subsequently, Coordinated Care Corporation, Premera Blue Cross and Bridgespan Health Company were granted the right to intervene and thereafter Coordinated Care filed its notice withdrawing as an intervenor therefore currently Premera Blue Cross and Bridgespan Health Company remain as Intervenors. On January 15, 2014, the OIC filed a Motion to Dismiss herein, and on January 17, 2014 SCH filed a Motion for Partial Summary Judgment and the Intervenors filed a Motion for Summary Judgment. All three motions were argued before the undersigned on February 3, 2014. Based upon the arguments of the parties and the hearing file, on February 20, 2014 the undersigned entered her Order Denying OIC's Motion to Dismiss and Order Denying Intervenors' Motion for Summary Judgment and on March 14, 2014 her Order Denying SCH's Motion for Partial Summary Judgment (in large part). Since that time, following several prehearing conferences and submissions which included all parties, the undersigned set forth the issues to be addressed at hearing which were a consolidation of all parties' submissions and agreements. Finally, most recently the undersigned has entered the Notice of Hearing herein, scheduling the hearing in this matter to commence on June 9, 2014 as requested by SCH in its Motion to Schedule Hearing as the parties had been previously advised. In addition, a prehearing conference, to include all parties, has been scheduled for Wednesday, May 14, 2014.

**LEGAL REQUIREMENTS CONCERNING DISCLOSURE OF EX PARTE
COMMUNICATIONS RECEIVED BY PRESIDING OFFICER FROM
AGENCY EMPLOYEE**

RCW 48.04.010 provides that any person aggrieved by any act or threatened act of the Insurance Commissioner, or order of the Commissioner, may be contested in an administrative hearing (adjudicative proceeding). Pursuant to WAC 284-02-070, hearings of the OIC are conducted according to chapter 48.04 RCW and chapter 34.05 RCW, the Administrative Procedure Act (APA) and chapter 10.08 WAC, the regulations adopted pursuant to the APA. RCW 34.05.455, part of the APA which governs adjudicative proceedings of the OIC, specifically provides:

- (1) *A presiding officer may not communicate, directly or indirectly, regarding any issue in the proceeding ... with any person employed by the agency without notice and opportunity for all parties to participate, ...*
- ...
- (3) *...persons to whom a presiding officer may not communicate under subsection[] (1) ...may not communicate with presiding officers without notice and opportunity for all parties to participate.*
- (4) *If, before serving as presiding officer in an adjudicative proceeding, a person receives an ex parte communication of a type that could not properly be received while serving, the person, promptly after starting to serve, shall disclose the communication in the manner prescribed in subsection (5) of this section.*
- (5) *A presiding officer who receives an ex parte communication in violation of this section shall place on the record of the pending matter all written communications received, all written responses to the communications, and a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication. The presiding officer shall advise all parties that these matters have been placed on the record. Upon request made within ten days after notice of the ex parte communication, any party desiring to rebut the communication shall be allowed to place a written rebuttal statement on the record. ...*
- (6) *If necessary to eliminate the effect of an ex parte communication received in violation of this section, a presiding officer who receives the communication may be disqualified,*
- ...

In addition, OIC documents require strict compliance with Title 34 RCW as required and to protect the integrity of the OIC hearings process and the mission of the agency.¹

¹ Specifically, in recognition of the requirement that hearings before the OIC require compliance with Title 34 RCW, the Position Description of the undersigned Presiding Officer, which was signed by Insurance Commissioner Mike Kreidler and then Chief Deputy Insurance Commissioner Mike Watson on August 20, 2012, states her duty to be:

Preside[s] alone and independently over all insurance entities' administrative appeals which contest acts of the OIC, and all other contested and/or adjudicative cases which come before the agency. This position is responsible for managing these cases from receipt of an appeal to the issuance of a final order on hearing, including determining right to hearing, hearing arguments and ruling on all preliminary motions, conducting the hearing, and drafting and issuing all final orders without review of any other individual. The

The undersigned began conducting proceedings which came before the OIC, and entering the final decisions therein, in 1986, and through her most recent 19 years delegated first by former Commissioner Senn and for the past ten years delegated by current Insurance Commissioner Mike Kreidler to act as Chief Presiding Officer for the OIC. This duty involves the conducting and entering the final decisions in all contested cases coming before the Insurance Commissioner pursuant to the requirements of Title 34 RCW. These requirements have been strictly complied with and there have been no previous ex parte communications or other undue influences received by the undersigned from the Insurance Commissioner, Chief Deputy Insurance Commissioner, any OIC staff or other individuals who were or had been involved in the cases which have come before her. In addition, the undersigned has received no prohibited ex parte communications or other undue influences from Insurance Commissioner Mike Kreidler.

James T. Odiorne assumed his position as Chief Deputy Insurance Commissioner beginning in March 2013. Although he had not called a private meeting, or made any attempt to meet with me prior to August 2013, I believe he made his first attempts to meet with me privately during that month because that was the time I had been deciding cases and issues related to the federal Affordable Care Act. By his conversations beginning at that time I believe he made these efforts to communicate with me ex parte about ongoing cases (at the time, the Coordinated Care case which involved the same significant issue as does the instant Seattle Children's Hospital case which is ongoing now) in order to influence the outcome of my decisions in the area of the federal Affordable Care Act, the Commissioner's approvals/disapprovals of the Washington Health Care Exchange filings made by carriers for certification by the Exchange and ultimate sale to Washington consumers.

**DISCLOSURE OF WRITTEN AND ORAL EX PARTE
COMMUNICATIONS RECEIVED BY PRESIDING OFFICER, AND
RESPONSES THERETO, AS REQUIRED BY TITLE 34 RCW**

- **Written ex parte communications to presiding officer.** Beginning in September 2013, Chief Deputy James T. Odiorne has approached the undersigned attempting to discuss the significant issue in this case. In addition, during the time that the Coordinated Care case was ongoing, Mr. Odiorne repeatedly attempted to discuss the significant issue (network adequacy) and impose his opinions and influence my decisions in the Coordinated Care case. Because the Coordinated Care case included the same significant issue (network adequacy) as does the SCH case (and indeed the SCH case includes the same parties) RCW 34.05.455(3) prohibited Mr. Odiorne from discussing the Coordinated Care case with me even after it was over. Written

proceedings require strict compliance with the Administrative Procedure Act and Washington Rules of Court. The cases are often complex, highly contested and involve significant issues in insurance law with statewide effect.

Said Position Description further states:

Because this position acts as the Chief Presiding Officer for agency adjudicative hearings, interactions with others to accomplish the work are governed by strict limitations on ex parte communications with other agency staff concerning issues that are the subject of those hearings. Therefore, communication between this position and OIC staff or external parties is limited ... governed by the Administrative Procedure Act, civil procedure (including Rules of Court), and state and federal case law.

communications from Mr. Odiorne constituting ex parte communications affecting the SCH case include one email sent to the undersigned on February 26, 2014 expressing displeasure with her Order Denying OIC's Motion to Dismiss entered February 20, 2014, other written statements by Mr. Odiorne which bear on this situation, and also his May 2014 work evaluation of the undersigned which reflects his expectation that I decide cases in favor of the Insurance Commissioner, as follows:

[Your] orders must as clearly and obviously support Commissioner's policy and program goals as the [sic] support the law. Since your orders are legally the acts of the Commissioner, they must be orders that he supports.

All written ex parte communications from Mr. Odiorne to me are included in the hearing file as required by RCW 34.05.455(5).

- **Written responses from the presiding officer** made in an attempt to have Mr. Odiorne cease his attempts to provide ex parte communications to the undersigned included a memorandum dated December 5, 2013 citing and discussing the ex parte prohibitions included in Title 34 RCW, which I had also discussed with him repeatedly during the private meetings he called. In addition, the undersigned had other written communications delivered to Mr. Odiorne in an effort to advise him of the applicable prohibitions on his behavior and to encourage him to cease these ex parte activities. All written communications referenced herein are placed in the hearing file as required by RCW 34.05.455(5).

- **Oral ex parte communications to the presiding officer.** As required, this document is offered in compliance with the requirement of RCW 34.05.455(5) that the presiding officer place in the record *a memorandum stating the substance of all oral communications received, all responses made, and the identity of each person from whom the presiding officer received an ex parte communication.* In response, oral ex parte communications include Mr. Odiorne's statements during several private one-on-one meetings from September 2013 to the current time - with April 15, 2014 being the most recent private meeting where he discussed issues related to the SCH case - he called with me which were normally shortly after entry of an interim, or final, order in this proceeding and in another proceeding (Coordinated Care) which included the same significant issue as is the significant issue in this case (and indeed includes the same parties). His conversations were without regard to the fact that the cases were at the time ongoing cases. He expressed displeasure about those of my decisions which did not uphold the Commissioner's position and he told me how he believed I was expected to have decided (always in support of the Commissioner's positions). In response to my efforts to explain the prohibitions of Title 34 RCW against ex parte contacts and undue influences on the presiding officer, he expressed an inability or unwillingness to understand those prohibitions in spite of my repeated attempts to advise and inform him. During two of these meetings, Mr. Odiorne instructed me to go meet with the Commissioner when I receive a case, find out how the Commissioner wants the case decided, and decide the case in the way the Commissioner wants. In response to my objections to that instruction, most recently, Mr. Odiorne has instructed me to go to the OIC staff members

to find out how the Commissioner wishes a case to be decided and to decide each case in the way the Commissioner wishes.

- **Oral responses from the presiding officer to Mr. Odiorne.** Said oral responses were delivered to Mr. Odiorne on each occasion in which he attempted to provide ex parte communications to the undersigned presiding officer, which were all during private one-on-one meetings called by Mr. Odiorne beginning in September 2013 and continuing to the present time, the last being April 15, 2014. On each occasion, the undersigned informed Mr. Odiorne of the prohibitions of Title 34 RCW, advised him that she could not talk to the Commissioner to find out how he wanted her to decide and then decide as indicated, that she could not communicate with OIC staff about how the Commissioner wished to decide any given case and then decide as indicated, and further explained that she must base her decisions on the evidence and argument presented during hearing in order to provide each party its constitutional right to due process. She also informed him that if she were to do as asked – obtain the preferences of the Commissioner and decide each case pursuant to the Commissioner’s preferences – then there would be no purpose for a hearing. She informed Mr. Odiorne that she believed that his oral ex parte communications to her about ongoing cases, what he was attempting to accomplish in his ex parte communications to her, was illegal and unethical.

REMEDY FOR EX PARTE COMMUNICATIONS

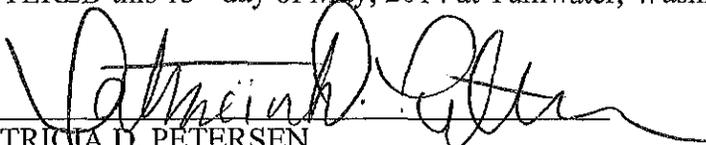
(3) As cited above, RCW 34.05.455(6) provides: *If necessary to eliminate the effect of an ex parte communication received in violation of this section, a presiding officer who receives the communication may be disqualified,*

As cited above, one remedy for ex parte communications delivered from an agency employee to the presiding officer may be disqualification of the presiding officer if it is necessary to eliminate the effect of the prohibited communications. However, in this situation the undersigned states that she does not believe that Mr. Odiorne’s ex parte communications to her, or his actions intended to influence her decision herein, have been successful. She does not believe that his actions have impaired her ability to continue to conduct this proceeding as an impartial presiding officer and to enter a fair and unbiased final decision after hearing. Further, in recognition of economy in the administrative process and the many hours of work which have gone into this case to date on the part of the undersigned presiding officer as well as the parties, it is the undersigned’s suggestion that she remain as presiding officer. This is with the expectation that the ex parte communications from Chief Deputy Odiorne will now cease. In addition, the undersigned has full respect for the OIC staff attorneys representing the Commissioner and trusts that they have not been involved in and would not condone any of the activities of Chief Deputy Odiorne which are the subject of the disclosure herein. In addition, the undersigned has full respect for the SCH counsel and Intervenors’ counsel and trusts that they, as well, have not been involved in and would not condone any of the activities of Chief Deputy Odiorne which are the subject of the disclosure herein.

Finally, RCW 34.05.455(5) requires that *upon request made within ten days after notice of the ex parte communication, any party desiring to rebut the communication shall be allowed to place a written rebuttal statement on the record. ...*

The disclosure above is done in compliance with the mandatory requirement set forth in RCW 34.05.455(5) concerning ex parte communications received by a presiding officer from an agency employee.

ENTERED this 13th day of May, 2014 at Tumwater, Washington.


PATRICIA D. PETERSEN
Chief 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: Michael Madden, Esq., Gwendolyn C. Payton, Esq., Timothy J. Parker, Esq., Mike Kreidler, James T. Odiome, J.D., CPA, Molly Nollette, AnnaLisa Gellerman, Esq., and Charles Brown, Esq.

DATED this 13th day of May, 2014.


KELLY A. CAIRNS