STATE OF WASHINGTON
PUBLIC EMPLOYMENT RELATIONS COMMISSION
MICHAEL P. SELLARS, EXECUTIVE DIRECTOR
112 Henry Street NE, Suite 300 • Post Office Box 40919 • Olympia, Washington 98504-0919
(360) 570-7300 • Fax: (360) 570-7334 • Email filings: filing@perc.wa.gov • Website: www.perc.wa.gov

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Janelle Peterson
Office of the Attorney General
janelle.peterson@atg.wa.gov

Cheryl L. Wolfe
Office of the Attorney General
cheryl.wolfe@atg.wa.gov

Edward Earl Younglove III
Younglove & Coker, P.L.L.C.
edy@ylclaw.com

Advisory Opinion 23-01
Case 136746-O-23, Washington State Office of Financial Management
Adult Family Home Providers Bargaining Unit

Dear Janelle Peterson, Cheryl Wolfe, and Edward Earl Younglove:

On May 12, 2023, the Adult Family Home Council (union) submitted a request for an advisory opinion under WAC 391-55-365.[1] The union is bargaining with the Washington State Office of Financial Management, on behalf of the State of Washington (employer or state), over the state's implementation of a proviso in the 2022 supplemental appropriations bill to the 2021–2023 biennial budget., Engrossed Substitute Senate Bill (ESSB) 5693, Section 215(7)(c).

The proviso requires the Washington State Health Care Authority (HCA) to coordinate with the Washington State Department of Social and Health Services (DSHS) in applying to the Centers for Medicare and Medicaid Services to provide a community behavioral health services benefit. The employer contends that the proviso in ESSB 5693 would require changing the billing and payment methodology to have behavioral health personal care service providers contract directly with a Managed Care Organization (MCO) for payment.

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[1] The advisory opinion process is a new process authorized by the Commission as part of its 2022 comprehensive rule revisions. WAC 391-55-365. The advisory opinion process applies to certain state interest arbitration eligible bargaining units, including individuals bargaining under RCW 41.56.029, and allows a party to request an opinion from the executive director as to whether a matter is a mandatory or nonmandatory subject of bargaining. *Id*. The process is less formal than an adjudication proceeding, with each party limited to filing a five-page brief. If the executive director decides to issue an advisory opinion, it is due within 30 days from the date all submissions were received. Any opinion is nonbinding, non-precedential, and inadmissible in any proceeding before this agency. *Id.*

The union seeks an advisory opinion over whether the state is obligated to bargain the decision requiring providers who provide covered services through an MCO to bill and seek reimbursement directly from the contracted MCO instead of through the state's ProviderOne billing system. I conclude that the decision over how services are billed and paid is a mandatory subject of bargaining because it relates to the manner and rate of subsidy and reimbursement.

Background

The state provides long-term care services to Medicaid-eligible elderly and developmentally disabled individuals (clients). Those services include housing, bathing, laundry, and meal preparation. Client eligibility is determined by DSHS through a financial and functional assessment. If the client is eligible for long-term care services, the client will then select what types of long-term services are best for the client. Clients who are eligible for long-term care services may elect to reside in an adult family home as part of those services. *State – Adult Family Home Providers*, Decision 12319 (PECB, 2015).

Although many Medicaid-eligible clients directly contract with providers for services, some receive their services through an MCO. The MCO manages all the medical services for the client, including housing and residential care services. The MCO contracts with an adult family home provider to provide those services. *Id.*

Currently, DSHS oversees how adult family home providers claim payment for services. The provider submits a claim through the ProviderOne billing system and DSHS processes the payment directly to the provider. DSHS then reconciles the payment after it occurs with the HCA.

In 2007 the Washington State Legislature granted adult family home providers the right to organize and collectively bargain with the state. The bargaining unit includes all providers who house clients that receive services from the Medicaid and state-funded long-term care programs regardless of whether the clients use an MCO to coordinate their services. *State – Adult Family Home Providers*, Decision 12319.[2]

RCW 41.56.029 specifically identifies the bargainable topics for adult family home providers and the state. The scope of bargaining "shall be limited solely to: (i) [e]conomic compensation, such as *manner and rate of subsidy and reimbursement*, including tiered reimbursements; (ii) health and welfare benefits; (iii) professional development and training; (iv) labor-management committees; (v) grievance procedures; and (vi) other economic matters." RCW 41.56.029(2)(c) (emphasis added).

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[2] In 2015, the bargaining unit was clarified to specifically add providers who provide services through a contract with an MCO. *State – Adult Family Home Providers*, Decision 12319. The clarification was made—over the objections of the employer—because the statute specifies one unit of all eligible adult family home providers. *Id*. At the time the unit clarification petition was filed, the providers who provided covered services through an MCO billed and were reimbursed by the MCO. *Id.*

Analysis

The union asserts that the decision to require providers to bill and receive reimbursements from an MCO and not through ProviderOne is a mandatory subject of bargaining because the decision deals with the manner and rate of subsidy and reimbursement. The employer disagrees and asserts that the decision about what type of billing system to use is distinct from economic compensation. According to the employer, the use of the term "manner" applies to the rate structure and rate amount, and the reference to "tiered reimbursements" in the statute limits "manner and rate" to apply to compensation method—hourly, monthly, based on geographic zones traversed, or the number of hours service is provided.

"Manner" is not defined in RCW 41.56.029. When interpreting statutes administered by this agency, the meaning of the words used in a statute are given the full effect intended by the legislature. *State – Transportation*, Decision 8317-B (PSRA, 2005). The statute's subject matter and the context in which the word is used must also be considered. *Id.*; *Chamberlain v. Department of Transportation*, 79 Wn. App. 212, 217 (1995). Statutes must be interpreted and construed so that all the language used is given effect and no portion is rendered meaningless or superfluous. *Whatcom County v. City of Bellingham*, 128 Wn.2d 537 (1996). Absent a specific definition, contrary legislative intent, or ambiguity, words in statutes are accorded their plain and ordinary meaning. *State v. Gonzalez*, 168 Wn.2d 256, 263 (2010). Statutes are not ambiguous merely because different interpretations are conceivable. *State – Transportation*, Decision 8317-B.

The employer's argument that the reference to "tiered reimbursements" in RCW 41.56.029 defines and limits what is meant by "manner and rate of subsidy and reimbursement" is not persuasive. Nothing cited by the employer indicates any intent to limit what is bargainable. Chapter 41.56 RCW is remedial in nature. Therefore, it is to be liberally construed and its exceptions are to be narrowly confined. *Washington State Ferries (Marine Engineers' Beneficial Association)*, Decision 13027-A (MRNE, 2020).

Further, the term "manner" is not ambiguous. The dictionary definition of manner is "a mode of procedure or way of acting." *Manner*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/manner (last visited June 15, 2023). How a provider bills and is reimbursed for services logically falls within the definition of manner of reimbursement.

Even if the statute did not specifically reference manner and rate of subsidy and reimbursement, the question of how providers bill for services and receive reimbursement, including when they receive compensation, is related to economic compensation. This is consistent with how the Commission has construed the duty to bargain for employees covered by the definition of collective bargaining in RCW 41.56.030(4).[3] For example, the Commission has routinely held

[3] "'Collective bargaining' means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures, subject to RCW 41.58.070, and collective negotiations on personnel matters, including *wages, hours, and working conditions*, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter." RCW 41.56.030(4) (emphasis added).

that a decision changing the frequency of payment of compensation constitutes a mandatory subject of bargaining. "The time when a worker is to receive his pay is so closely related to how much he is paid that it reasonably falls within the term 'wages.'" *City of Auburn*, Decision 455 (PECB, 1978). *See also City of Anacortes*, Decision 1493 (PECB, 1982); *City of Sumner*, Decision 1839 (PECB, 1984); *Lewis County*, Decision 2957 (PECB, 1988).[4]

The employer further asserts that even if the question of whether providers will use ProviderOne or bill an MCO directly is generally a mandatory subject of bargaining, that question is rendered nonmandatory by state and federal laws regarding Medicaid. Specifically, the employer contends that the language in the proviso in ESSB 5693, Section 215(7)(c), requires the state to implement the billing and reimbursement procedures at issue. That section provides as follows:

> The authority shall coordinate with the department of social and health services to develop and submit to the centers for medicare and medicaid services an application to provide a 1915(i) state plan home and community-based services benefit. The application shall be developed to allow for the delivery of wraparound supportive behavioral health services for individuals with mental illnesses who also have a personal care need. The waiver shall be developed to standardize coverage and administration, improve the current benefit design, and clarify roles in administration of the behavioral health personal care services benefit.

The employer also points to RCW 41.56.029(4), which provides that nothing in that section modifies the state's right to establish a plan of care or manage long-term care services, the state's obligation to comply with federal Medicaid laws and regulations, or the legislature's right to make programmatic changes to the delivery of long-term care services.

There is nothing in ESSB 5693, RCW 41.56.029(4), or the other state or federal laws regarding Medicaid cited by the employer that specifically calls for behavioral health personal care service providers to bill and be reimbursed through an MCO and not ProviderOne. In order for a statutory provision to render what would usually be a mandatory subject of bargaining nonmandatory, the language must be clear and unmistakable. *See, e.g.*, *Washington State Ferries (Marine Engineers' Beneficial Association)*, Decision 13027-A. That is not the case here.

Moreover, a proviso in an appropriations bill cannot amend an existing law or modify the statutory bargaining rights of adult family home providers. "An appropriations bill which 'defines no rights' certainly cannot abolish or amend existing law. It cannot add restrictions to public assistance eligibility and still be said to define no rights. The proper legislative procedure

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[4] The employer also asserts that the decision regarding billing and reimbursement is not a mandatory subject under the balancing test prescribed by *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 203 (1989). Given the statutory description of the scope of bargaining, it is not clear whether the traditional balancing test is germane. Regardless, as stated above, how and when a provider goes about receiving reimbursement for services provided clearly falls within the meaning of economic compensation or "wages." *City of Auburn*, Decision 455.

is to enact separate, independent, properly titled legislation." *Flanders v. Morris*, 88 Wn.2d 183, 188 (1977).

Finally, the employer asserts that the current collective bargaining agreement between the parties reserves to the state the right to determine how and when billing and reimbursement will occur. Specifically, the employer relies upon the following provisions concerning rights reserved to the state in Article 4.2:

> D. To manage, direct and control all of the State's activities to deliver programs and services;
>
> E. To develop, modify and administer policies, procedures, rules and regulations and determine the methods and means by which operations are to be carried out;

Essentially, the employer is asserting a waiver by contract. A waiver by contract of statutory bargaining rights must be consciously made, clear, and unmistakable. *Tacoma School District*, Decision 12975 (PECB, 2019); *City of Yakima*, Decision 3564-A (PECB, 1991). The burden of proving a waiver is on the party asserting it. *Tacoma School District*, Decision 12975. The Commission employs an "objective manifestation" theory of contracts, which imputes to a person an intention corresponding to the reasonable meaning of the person's words and actions. *Id*. A typical management rights clause generally fails to meet the standard to constitute a waiver of statutory rights. *Chelan County*, Decision 5469-A (PECB, 1996). The waiver cannot be implicit. *City of Wenatchee*, Decision 8802-A (PECB, 2006).

An advisory opinion may be issued on the question of whether a matter is a mandatory or nonmandatory subject of bargaining. WAC 391-55-365. There is arguably no authority to issue an opinion on whether there is a waiver by contract. An advisory opinion, where there is not a full presentation of evidence, does not lend itself to an opinion on whether there is a waiver by contract.

Conclusion

I conclude that the decision to obligate providers to bill MCOs directly rather than use ProviderOne to bill for services provided is a mandatory subject of bargaining.

Sincerely,

Michael P. Sellars, Executive Director
mike.sellars@perc.wa.gov | (360) 570-7306