

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:

INTERPRETERS UNITED -  
WASHINGTON FEDERATION OF  
STATE EMPLOYEES

Involving certain employees of:

STATE - LANGUAGE ACCESS  
PROVIDERS

CASE 23334-E-10-3570

DECISION 10871-A - PECB

ORDER DETERMINING  
ELIGIBILITY ISSUES

*Anita Hunter*, Attorney at Law, for the union.

Attorney General Robert M. McKenna, by *Donna Stambaugh*, Senior Assistant Attorney General, for the employer.

The 2010 Legislature passed Laws of 2010, Chapter 296 (ESSB 6726) authorizing Language Access Providers conducting interpreter services for Department of Social and Health Services (DSHS) to exercise collective bargaining rights under Chapter 41.56 RCW. On July 2, 2010, the Washington Federation of State Employees (WFSE or union) filed a representation petition seeking to be certified as the exclusive bargaining representative of a bargaining unit of all Language Access Providers as provided for by the new law.

On August 5, 2010, Representation Coordinator Sally J. Iverson held an investigation conference and issued an Investigation Statement pursuant to WAC 391-25-220(2). The parties agreed to the following bargaining unit description which virtually repeats the definition of Language Access Providers in legislation codified at RCW 41.56.030(10)(a):

All language access providers who are persons defined as any independent contractor who provides spoken language interpreter services for Department of Social and Health Services appointments or Medicaid enrollee appointments, or provided these services on or after January 1, 2009, and before June 10, 2010, whether paid by a broker, language access agency, or the Department of Social and Health Services.

However, during the investigation conference, the employer challenged the eligibility of 217 of the total 1556 Language Access Providers. An election was conducted whereby 851 of 1556 eligible employees selected WFSE as their bargaining representative. The 217 challenged ballots did not affect the results of the election. An interim certification was issued on September 27, 2010, and the issue of the challenged ballots was referred to hearing to resolve the eligibility issues.<sup>1</sup>

Prior to the hearing, the parties agreed to the eligibility of all but 34 of the individuals remaining on the challenged list. The parties were not able to agree regarding those interpreters who provide interpreter services for two programs at the DSHS: 30 Language Access Providers working in the Medicaid Administrative Match (MAM) Program; and 4 Language Access Providers working in legal settings.

The employer did not agree to the eligibility of the Language Access Providers working in the MAM Program on the basis that the MAM Program, including interpreter services, is not funded with any state resources. The employer also asserts that the Legislature did not intend to provide interpreters working in the MAM Program with collective bargaining rights as evidenced by multiple parts of the statute that do not apply to them. The employer further asserts that the Legislature did not intend to provide interpreters working in legal settings with collective bargaining rights because the proceedings do not meet the definition of "appointment" under the statute.

Hearing Officer Joel Greene conducted a hearing on May 10 and 11, 2011, to develop the record. Both parties filed post-hearing briefs and reply briefs which were considered.

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<sup>1</sup> *State – Language Access Providers*, Decision 10871 (PECB, 2010).

ISSUES

1. Should the interpreters working in the MAM Program be included in the statewide unit of Language Access Providers as provided in RCW 41.56.030(10)(a)?
2. Should the interpreters working in legal settings be included in the statewide unit of Language Access Providers as provided in RCW 41.56.030(10)(a)?

Based upon the record, the interpreters who work in the MAM Program and in legal settings are included in the statewide unit of Language Access Providers.

APPLICABLE LEGAL PRINCIPLES

The determination of appropriate bargaining units is a function delegated by the Legislature to this agency. *City of Richland*, Decision 279-A (PECB, 1978), *aff'd*, 29 Wn. App. 599 (1981), *review denied*, 96 Wn.2d 1004 (1981). In the present case, a traditional community of interest analysis is not needed because RCW 41.56.510(2)(a) states that “a statewide unit of all language access providers is the only unit appropriate for purposes of collective bargaining under RCW 41.56.060.” Therefore, any individual who meets the statutory definition of a language access provider must be included in the proposed unit. *See, e.g., Lower Columbia College*, Decision 3987-A (CCOL, 1992) (commenting on statutorily defined units).

ANALYSIS

A review of the applicable statute and final bill is necessary to determine the Legislature’s intent. ESSB 6726 defined “Language Access Provider” as:

any independent contractor who provides spoken language interpreter services for department of social and health services appointments or Medicaid enrollee appointments, or provided these services on or after January 1, 2009, and before June 10, 2010, whether paid by a broker, language access agency, or the department.

That definition is codified at RCW 41.56.030(10)(a).

Medicaid is a joint federal and state program that provides health related services to low income and/or disabled persons. The program allows state governments to receive matching federal funds to provide health care services to eligible individuals. Determination of Medicaid eligibility in Washington is made by an office within DSHS titled Economic Services Administration.<sup>2</sup>

Because they are recipients of federal funds, health care providers who accept Medicaid patients are required to ensure equal access to their services. Although services are ultimately the responsibility of the provider, DSHS has historically voluntarily funded interpreter services for Medicaid recipients. In most cases, DSHS uses a brokerage system to assist with the facilitation of the interpreter requirements for Medicaid recipients.

There are eight non-profit brokers who provide oversight and act as independent gatekeepers for interpreter services. The brokers maintain call centers, perform billing and audit functions and interact directly with DSHS staff. Under the brokerage system, DSHS sets the hourly rate which is currently \$34.00. DSHS pays the broker, or “passes through”, the \$34.00 per hour rate for interpretive services, which in most cases is a combination of state and federal funding. The broker does not keep any of the \$34.00 hourly rate charge but instead is paid a fixed administrative overhead fee based on an approximate number of encounters. The broker then contracts with a Language Access Agency who serves as a conduit for scheduling and payment of the individual interpreters. The broker passes through the \$34.00 hourly rate to the Language Access Agency, which in turn determines how much to pay the individual interpreter. DSHS does not require Language Access Agencies to pay a certain amount to the interpreters.

#### Interpreters in the MAM Program

MAM is a voluntary program that allows local health jurisdictions, public hospitals, schools and tribes who provide outreach activities to Medicaid recipients the opportunity to receive matching federal funds for those activities. The MAM Program covers indirect medical services such as

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<sup>2</sup> Legislation passed during the 2011 legislative session moved this responsibility to the Health Care Authority, effective July 1, 2011. Laws of 2011, 1<sup>st</sup> Special Session, Chapter 15 (2E2SHB 1738).

application assistance and interpreter services and does not cover direct Medicaid services such as immunizations or physicals. Interpreter services is one of the outreach activities eligible for matching funds.

The federal government provides matching funds for MAM to the local entity through DSHS as the designated state Medicaid agency with the understanding that there must be matching funds in order to receive the federal reimbursement. The public entity pays 50% from local fees and that amount is matched by federal funds. Local health jurisdictions and public hospitals either have interpreters on staff or use Language Access Agencies to provide interpreters. Entities utilizing the MAM Program are not allowed to use the brokerage system because the federal government is already paying the costs for direct services and would consider it a double payment to also pay the costs for indirect services.

The employer argues that state laws providing collective bargaining rights to Language Access Providers should only apply when accompanied by the expenditure of state funds; therefore, the interpreters providing services for the MAM Program should not be included in the bargaining unit because the program is paid for with local and federal dollars. The employer also points out that DSHS employees who administer the MAM Program are not funded by state appropriations, but rather through an administrative fee shared by the local entities and the federal government. The employer thus asserts that the Legislature did not intend for interpreters in the MAM Program to be included in this bargaining unit and therefore RCW 41.56.510 does not apply to them.

Historically, funding source has not been used by the Commission to determine the appropriateness of a bargaining unit. In *Benton County*, Decision 7651-A (PECB, 2003), *citing Kitsap County*, Decision 4314 (PECB, 1993), the Commission noted that “‘source of funds’ is not among the unit determination criteria set forth in RCW 41.56.060, and that it is commonplace to find a mix of federally funded, state funded, grant funded, and locally funded positions commingled in local government bargaining units.” Although this cited case relates to local government employees and not state employees, the same inference can be made in the present case. Many state employees who are currently represented by an exclusive bargaining

representative have positions funded by federal dollars, and the source of funds, whether from state, federal or grant sources, has not been used to determine whether an employee is entitled to collective bargaining rights. These principles are applicable here.

Kathi Roberts, Program Manager, Office of Community Services at DSHS, testified that in order to be paid by DSHS, interpreters must be certified, regardless of whether they work in the MAM Program, medical appointments or social service appointments. Alan Himsl, Section Manager for the Medicaid Outreach Section at DSHS, testified that although DSHS does not direct health districts and public hospitals concerning who they hire or how much to pay them, they must meet minimum DSHS standards and use DSHS certified interpreters. Interpreters must abide by an interpreter code of professional conduct which is written into the interlocal agreements between DSHS and the public entity. DSHS monitors a percentage of these contracts quarterly.

The interpreters in the MAM Program are generally hired by a Language Access Agency and receive their pay directly from the same agency. Victor Hidalgo, a DSHS certified interpreter, testified that interpreters do not know which DSHS program the money originates from. Rather, the interpreter receives a call from an agency stating there is a need for an interpreter and the interpreter provides the service, bills the Language Access Agency, and receives payment from the same agency. The interpreter has no way of knowing whether they are being paid with federal, state, or local money.

Although there may not be any state dollars directly paying interpreters in the MAM Program, DSHS plays a major role in how the program is run. DSHS designs the testing requirements and certifies interpreters, provides interpreter code of professional conduct, monitors agencies, public hospitals, and local health districts to ensure compliance, and passes through money from the federal government. Although this program is not funded in the same way the brokerage programs are funded, the Language Access Providers are providing the services intended by the Legislature.

RCW 74.04.025 governs those proceedings where interpretive services must be provided and states:

- (1) The department and the office of administrative hearings shall ensure that bilingual services are provided to non-English speaking applicants and recipients. The services shall be provided to the extent necessary to assure that non-English speaking persons are not denied, or unable to obtain or maintain, services or benefits because of their inability to speak English.

This proviso demonstrates that the Legislature intended DSHS to ensure interpreter services were provided in programs such as the MAM Program. If the Legislature intended to exclude employees who are federally funded, it would have explicitly stated so. Because no exclusion exists within ESSB 6726, it must be assumed the Legislature intended that all employees who ensure that non-English speaking persons receive appropriate services or benefits in DSHS programs are included in this definition.

#### Interpreters in Legal Proceedings

DSHS Division of Children and Family Services (DCFS) is charged with the responsibility of protecting the safety and well-being of children and providing services for abused and neglected children and their families. DCFS is frequently involved in court proceedings to determine whether children will remain with their parents. If participants have limited English proficiency, an interpreter is required. DCFS is assisted in these proceedings by the Attorney General's Office (AGO), who petitions the court on the DCFS's behalf.

Again, RCW 74.04.025 states the "department and the office of administrative hearings shall ensure that bilingual services are provided to non-English speaking applicants and recipients." This language infers that interpreters providing services in legal proceedings would be included. The employer argues that interpreters in legal settings do not meet the definition of "appointments" under the statute. An examination of this proviso, in context with the complete statutory structure, demonstrates a legislative intent to include interpreters providing services in a legal setting. These services are for clients of DSHS and at the direction of DSHS, albeit in a legal setting. While the AGO makes arrangements for services in most areas, in King and Snohomish counties DSHS actually arranges and pays the interpreters for legal matters. The fact that DSHS actually assumes that responsibility in at least two counties shows it has a connection to these services and is directly responsible for ensuring interpreter services in these legal settings.

CONCLUSION

Language Access Providers working in the MAM Program provide services to ensure equal access for Medicaid enrollees. The source of funds for the MAM Program is irrelevant to determining the collective bargaining rights of the petitioned-for employees. The Commission has long recognized that absent specific legislative direction, source of funds is not among the unit determination criteria used to decide an appropriate bargaining unit for collective bargaining. Therefore, it would not be appropriate for the Commission to deny language access providers working in the MAM Program collective bargaining rights based on their funding source.

Language access providers working in legal settings provide services for DSHS appointments as required by the statute. The statute is not restricted to Medicaid appointments, but also includes Department of Social and Health Services appointments. A plain reading of ESSB 6726 demonstrates that the Legislature intended DSHS to provide interpreter services to ensure that non-English speaking persons are not denied or unable to obtain or maintain services or benefits because of their inability to speak English. These services and benefits include legal appointments.

FINDINGS OF FACT

1. The State of Washington is a public employer for purposes of collective bargaining within the meaning of RCW 41.56.510.
2. The Washington Federation of State Employees is a bargaining representative within the meaning of RCW 41.56.030(2).
3. Under RCW 41.56.510(2)(a), a statewide unit of all Language Access Providers is the only appropriate unit for purposes of collective bargaining under RCW 41.56.060.



4. Interpreters working in the Medicaid Administrative Match (MAM) Program are Language Access Providers as defined by RCW 41.56.030(10)(a).
5. Interpreters working in legal settings are Language Access Providers as defined by RCW 41.56.030(10)(a).

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-25 WAC.
2. As described in Findings of Fact 3, 4 and 5, interpreters working in the MAM Program and in legal settings are included in the statewide unit of all Language Access Providers.

ORDER

The interpreters working in the MAM Program and in legal settings are included in the statewide unit of all Language Access Providers.

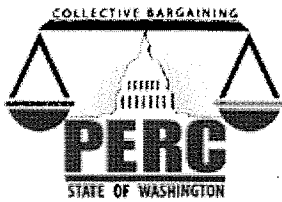
Issued at Olympia, Washington, this 18<sup>th</sup> day of November, 2011.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CATHLEEN CALLAHAN, Executive Director

This order will be the final order of the agency unless a notice of appeal is filed with the Commission under 391-25-660.



**PUBLIC EMPLOYMENT RELATIONS COMMISSION**

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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DISPUTE: QCR UNORGANIZED  
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