



BEFORE THE ARBITRATOR

In the Matter of the Interest Arbitration Between
WASHINGTON STATE RESIDENTIAL CARE
COUNCIL

Council,

and

STATE OF WASHINGTON, DEPARTMENT OF
SOCIAL AND HEALTH SERVICES,

Employer.

P.E.R.C. No. 2688-I-14-0662

ARBITRATOR'S DECISION
AND AWARD

2015-2017 COLLECTIVE
BARGAINING AGREEMENT

HEARING DATES:

August 25, 26 and 27, 2014

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ARBITRATOR

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INTRODUCTION

This interest arbitration is conducted pursuant to RCW 41.56.029 and the regulations promulgated thereunder. The parties to this dispute are the State of Washington, Department of Social and Health Services (DSHS), hereinafter referred to as the Employer or State, and the Washington State Residential Care Council, hereinafter referred to as the WSRCC or Council. The parties have been parties to three collective bargaining agreements, the last for the term July 1, 2013 through June 30, 2015. The parties engaged in a good faith effort to negotiate a successor collective bargaining agreement but were unsuccessful. Impasse was declared by PERC and on August 18, 2014, PERC certified the following issues to interest arbitration:

- Article 7.1, Base Daily Rates
- Article 7.2, Mileage Reimbursement
- Article 7.3, Trip Fee
- Article 7.4, Specialized Care Add-On Rates
- Article 7.5, Specialized Behavioral Support Add-On Rate
- Article 7.6, Bed Hold Rate
- Appendix A, Adult Family Home Daily Rate
- Appendix B, Adult Family Home Capital Add-On Rate
- Appendix C, Specialized Care Add-On Rate

On August 19, 2014, the State filed a complaint against the Union alleging that the Union has advanced non-mandatory subjects of bargaining to interest arbitration.

On August 22, 2014, PERC, pursuant to WAC 391-55-265(1)(a) and (c) suspended the determination of the following issues in interest arbitration proceeding:

- Article 7.1, Appendix B. pertaining to "the capital add-on rate"
- Article 7.2, Mileage Reimbursement
- Article 7.3, Trip Fee
- Article 7.4, Specialized Care Add-On Rates
- Appendix B, Adult Family Home Capital Add-On Rate
- Appendix C, Specialized Care Add-On Rate

The suspension of the determination of these issues will remain in effect while the unfair labor practice proceeding is pending.

Hearing was held on August 25, 26 and 27, 2014. The proceeding was recorded and a transcript of 672 pages including 164 exhibits was submitted to the parties and the Arbitrator. At the conclusion of hearing, the parties made closing arguments in lieu of written briefs.

The closing arguments made by the parties were comprehensive, well reasoned and supportive of their respective positions. Because of the extensive three-day record of evidence, including the substantial volume of exhibits, and substantial closing arguments, it would be impractical for the Arbitrator to restate, in detail, the evidence and the arguments of the parties in the decision and Award. The parties should be assured, however, that the Arbitrator has read the record exhibits and closing arguments in their entirety in formulating the instant Award. Of course, both the relevant facts and key arguments of the parties will be discussed when each proposal is addressed.

Collective bargaining is a process of reason and rationale. It is a give-and-take process. Any proposed changes, modifications, additions or deletions must be based on need or other reasonable basis. Therefore, the party proposing a change has the burden of establishing the reasons therefor and whether its proposal addresses the reasons for the change. Collective bargaining, of course, is not done in a vacuum. The parties in support of their positions rely on a number of factors or criteria. Interest arbitrators must also be guided by the same factors. The statutory factors to be considered by the Arbitrator are the following as enumerated in RCW 41.56.465:

- (a) The constitutional and statutory authority of the employer;
- (b) Stipulations of the parties;
- (c) The average consumer prices for goods and services, commonly known as the cost of living;
- (d) Changes in any of the circumstances under (a) through (c) of this subsection during the pendency of the proceedings; and

(e) Such other factors, not confined to the factors under (a) through (d) of this subsection, that are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment. For those employees listed in RCW 41.56.030(7)(a) who are employed by the governing body of a city or town with a population of less than fifteen thousand, or a county with a population of less than seventy thousand, consideration must also be given to regional differences in the cost of living.

(i) In addition to the factors to be taken into consideration by an interest arbitration panel under RCW 41.56.465, the panel shall consider the financial ability of the state to pay for the compensation and benefit provisions of a collective bargaining agreement.

(ii) The decision of the arbitration panel is not binding on the legislature and, if the legislature does not approve the request for funds necessary to implement the compensation and benefit provisions of the arbitrated collective bargaining agreement, the decision is not binding on the state.

The Arbitrator will base his decision on the specific statutory factors listed, if applicable, and factors normally or traditionally taken into consideration in negotiations.

BACKGROUND:

The State of Washington, Department of Social and Health Services (DSHS), provides its citizens with the option of 24-hour care and services in a community-based neighborhood residential setting in what is referred to as Adult Family Homes (AFH). The providers of AFH are individuals, families, or business enterprises. They are not State employees

(RCW 41.56.029).¹ There are approximately 2,700 AFH across the State. Each is independently licensed and operated. Each home is limited to six residents. Residents in the homes are both Medicaid and private residents. In 2014, 7,154 beds out of a total of approximately 15,000 beds were occupied by Medicare residents. The occupancy rate of the homes is about 82%. AFH do not have to accept Medicaid residents if they do not wish to.

The providers of AFH are represented by Washington State Residential Care Council (WSRCC or Council) for purposes of collective bargaining over certain issues including the State's reimbursement rates for adult family home services provided to residents on Medicaid and other state-funded long-term care programs. The Council was certified in 2008. The first collective bargaining agreement (CBA) between the parties was for the 2009-2011 biennium period. There were two successor agreements. All were voluntary settlements. This is the parties' first arbitration. It is for the 2015-2017 biennium.

The following is an accurate overview of AFH and services provided as stated by Navigant Consulting in its report dated June 2014:

Adult Family Homes are residential homes licensed to care for up to six non-related residents and provide housing, meals, laundry, any necessary supervision and help with activities of daily living. Adult Family Homes can also provide personal care and social services to their residents and allow residents to live an independent lifestyle in a community setting while receiving necessary services from Adult Family Home staff. Some Adult Family Homes provide intermittent nursing services and others may specialize in serving people with mental health needs, developmental disabilities, or dementia.

Based on data provided to us by the Department as of December of state fiscal year 2014, approximately 43 percent of all Adult Family Home residents pay for

¹ There are three other similar providers of services who are not employees of the State; Individual Home Care providers, Child Care providers and Language Access providers. The first two providers are represented by locals of SEIU and the latter by the State Federation.

their care privately, where the remaining 57 percent of Adult Family Home residents are eligible for Medicaid services. The Department contracts with Adult Family Homes to provide services for Medicaid residents in Adult Family Homes.

Under federal regulations, federally-matched state Medicaid dollars may not be used to pay for the room and board costs associated with long-term care services, including the room and board components of costs in Adult Family Homes. As such, Medicaid residents in Adult Family Homes are responsible for paying for their own room and board, and the Department pays only for the allowable Medicaid services that residents receive. The Department will in some cases pay for room and board expenses with state only dollars when, for instance, the resident has no or little participation to cover the room and board expense.

Based on data provided to us by the Department, there were approximately 2,700 Adult Family Homes in Washington State in 2013, with approximately 15,300 licensed beds. Of those, approximately 2,500 were Medicaid contracted (93 percent of the total number of Adult Family Homes), and those Medicaid contracted Adult Family Homes had approximately 14,000 licensed beds (92 percent of the total number of licensed beds). In the State of Washington, Adult Family Homes can enter into a contract with the Department to provide care to Medicaid residents, but that contract does not require that they accept all Medicaid-eligible residents, even if they have available beds. Adult Family Homes in Washington can refuse to accept Medicaid residents at their discretion, even if they are a Medicaid-contracted provider.

(S Ex. 15)

The Home and Community Services Division of DSHS is responsible for determining Medicaid eligibility. Medicaid eligibility is a means tested program, i.e., one must be low income to qualify and be deemed financial eligible. Also, one must meet functional eligibility criterion as defined in the Medicaid State Plan which requires that one must need assistance with activities of daily living.

Once someone is determined eligible, he/she then chooses the setting in which they want to receive their services: (1) in their home and have a provider come into their home (individual provider), (2) receive services in a 24-hour setting (AFH), or (3) in a Nursing Home if eligible.

Each client is assessed. The Comprehensive Assessment Reporting Evaluation (CARE) is the standard client assessment tool used by case managers to document a client's functional ability, determine eligibility for long-term care services, evaluate what and how much assistance a client will receive, and develop a plan of care. The care tool places individuals in one of 17 classification groups. The objective is to make sure clients with similar needs receive the same service and payment rates throughout the State (interpreter reliability).

About 10 years ago, the State conducted an extensive review of the care needed by AFH residents, also referred to as a time study (U Ex. 21). The result was the adoption of a methodology that established a daily reimbursement rate for adult family home services on a client-by-client basis based on each client's assignment to one of 12 unique CARE classifications. These CARE classifications are reflective of different levels of resources that are required to care for residents with individual needs. In July of 2008, the methodology was expanded to include 17 unique classification groups. Under the current rate setting methodology, each Medicaid-eligible Adult Family home resident is assigned to one of the 17 CARE classifications based on an assessment of the resident using the CARE assessment tool. The daily reimbursement rate for services varies based on this classification as well as the geographic area the services are provided.

Federal law requires that Medicaid providers are reimbursed at levels consistent with efficiency, economy, and quality of care and the level of reimbursement is sufficient to attract enough providers to provide services to the population. The State bargains the rates with the Council. Ultimately, however, the Legislature must approve. The rates are part of the State's overall budget. The daily rate includes instrumental activities of daily living (IADLS). In

addition to the daily rates, there are other rates that apply, including Bed Hold Rates, Expanded Community Services Rate and Specialized Behavior Support Add-On Rate.

The Bed Hold Rates pay providers 70% of daily rate the first seven days and \$15 per day to hold a bed for clients absent for 8 to a maximum of 20 days.

The Expanded Community Services Rate is a contract rate with providers for clients who relocate or are diverted from State psychiatric hospitals. It has been expanded over the years to include individuals who require additional behavior support. This additional support is provided by an outside contractor who works with the provider to create a behavior support plan. The additional money is for the coordination between the provider and outside contractor.

The Specialized Behavior Support Add-On Rate is new, negotiated in the current contract. These clients are ones relocated or diverted from State psychiatric hospitals that no longer need active psychiatric treatment but do have behavior support needs. The add-on rate is for the coordination between the provider and outside contractor who addresses the client's behavior needs. It also pays for an additional six to eight hours a day of staffing to provide the one-on-one support for some who have significant behavior problems needs.

The State is required to have a four-year balanced budget. Thus, the Legislature has to consider the revenue forecast in developing their budget. The forecast is a matter for the Economic and Revenue Forecast Council.² The Council is required to develop three revenue forecasts; an optimistic revenue forecast, pessimistic revenue forecast, and a baseline forecast or the recommended forecast. The most recent update was the June 2014 update. This update is

² The Council is comprised of two members of the Senate, two members from the House of Representatives, the director of the Office of Financial Management, the director of the Department of Revenue, and the director of the State Treasurer's Office.

used to develop budget instructions to the State agencies. These agency expenditures must be balanced with revenues.

The budget is also impacted by caseloads. There is a Caseload Forecast Council whose role is to adopt an official caseload for several programs. One such program is the Medicaid program. The caseload forecast is a large driver of the budgets because many of the forecasts are maintenance level budget items and some are mandatory budget items, meaning that once the Council adopts a Caseload Forecast and its costs, it must be covered.

There are several funds that are primarily a part of the budget including the general fund. The most relevant fund for the Department of Social and Health Services (DSHS) - which administers the AFH program - is the general fund. The general fund is derived from retail sales and use tax (50.6%), 20% from business and occupation tax, 12% from hospital tax, 3.5% from real estate excise tax, and 13.9% other.

In the 2013-2015 biennium there was a \$1 billion shortfall. The state was able to make it up with one-time savings.

For the 2015-2017 biennium, there is projected additional revenue of \$2.6 billion (8.3% increase) but there is a projected \$900 million shortfall, expenses over revenue. There is an additional liability of \$1.2 billion - \$2 billion as a result of a Supreme Court decision in the McCleary case.³ The State, however, by statute is required to set aside one percent of general fund state revenue as a reserve which can be used with 60% vote of the Legislature. This is referred to as the stabilization account.

³ The Court found that the State was not meeting its education requirements and required the State to provide a detailed implementation plan per the Court's findings.

In June 2014, each State agency was directed to reduce their budget equal to 15% of unprotected Near-General Fund Maintenance Level budgets. This was the first step of a two-step process. The second step requires budget requests for funding building off the lower budget base. Agencies can request incremental funding above the new base budget level. The responses are due September 11. The Office of Financial Management will review the responses and develop options to be presented to the Governor for consideration in the development of its budget. The 15% reduction is not final, but a target. The final budget reduction amount will be based off of the September 27th revenue forecast. The 15% reduction is not certain.

ISSUES:⁴

Issue No. 1. BASE DAILY RATES

This issue is admittedly the most important of the issues before the Arbitrator.

The Council's proposal calls for a 17.52% increase of daily rates in FY 2016 and an additional 2.5% increase in FY 2017 for a total increase of 20.45% for the 2015-2017 biennium.

The State has proposed a 5% increase in daily rates for the biennium effective FY 2016.

The parties have two diverse approaches in determining what they believe to be the appropriate daily rate increases.

The Council's proposal is driven by the adoption or update of the model used by the State in 2002 in determining daily rates at that time. The Council explains that in 2002, the State completed what is referred to as the "Washington State Residential Care Time Study" (U Exh..21). The time study assessed the amount of time it took to care for an individual that had

⁴ Only issues that have not been suspended are before the Arbitrator.

certain characteristics. The subsequent rate structure that was developed from this model examined data and various benchmarks on what it would cost a provider, in terms of salaries and wages, payroll taxes, fringe benefits, capital costs, and other factors, to provide care for the number of hours required in a resident's assessment (U Exh.47).

The Council argues that the State has since diverged from the logic and analytic approach of its own model. First, after the initial setting of the rates, the State has approached the rate setting process each year through the budget appropriation process, i.e., the Governor and Legislature decide how much to appropriate to a rate increase.

Second, the original time study helped to establish a 12-tier rate reimbursement structure. In FY 2009 the State moved to a 17- level reimbursement system. The State, however, did not do a new time study to correlate the rates to the hours of care associated with each tier.

It is the Council's position that the consequence of both of these steps by the State is that, over time, the rates have lost their grounding and connection to the amount of hours it actually takes to serve the needs of a resident.

Council witness Allen Miller, from Washington Health Care Association, testified how he updated the DSHS's 2004 report to the Legislature entitled "Care & Medical Payment System for Licensed Boarding Homes"⁵ (U Ex. 47). It is his opinion that although the report was for assisted living, it applies to AFH as well because of the benchmarks used. He took a 2009 model based off of the 2004 report that had 2005 benchmarks, and recreated the report with 2011 nursing home costs to arrive at new benchmark costs and a per patient day rate dollar figure. He updated the 2011 cost figures to 2014 by applying cost-of-living adjustments to the 2011 costs.

⁵ Licensed boarding homes are now referred to as assisted living homes.

Council witness John Ficker, Executive Director, WSRCC, explained the logic and basis for the Council's proposal. It was based on Miller's recreation of the State's original time study. The rates were established using new benchmark costs to the original study. The new model generated daily rate increases of 17.5% for the first year of the 2015-2017 biennium.

The Council believes its proposal is reasonable not only because it is based on the updated model, but because of the deficient rate increases in the past. The Council argues that one of the statutory factors to consider is cost of living. The cost of living between 2005 through 2014 for the State increased an aggregate amount of approximately 25%. The "C medium" rate for AFH only went up 3.98%

Another factor relied upon by the Council is internal comparability. There are three other represented groups in the State that also have collective bargaining rights but are made up of "non-regular" members who are not traditional state employees. These are the individual home care providers, the home children providers, and the language access providers. On an aggregate basis between 2005 and 2014, the individual home care providers have seen their entry level wages increase by 21.81% versus 3.98% for the adult family homes (U Ex. 25). Against the home child care providers between 2008 and 2014, the adult family home rate is actually negative 2.22% while that group has seen increases over 9% (U Ex. 25). And, with the language access providers for 2012-2014, that group is up 8.23% versus a mere 1.45% for the adult family homes (U Ex..25).

The Council contends that there is money in the 2015-2017 budget to meet its proposal. In this regard, Council witness Len McComb⁶ reviewed the 2015-2017 budget and the Council's

⁶ McComb is principal and owner of Two Medicine Communications. Previously, he was director of OFM for the Governor (1989-1993), and director of the Department of Revenue for the Governor (1993-1997).

proposal and reached the following conclusions; that the total reserve for the 2015-2017 biennium is projected to be \$1.257 billion; the possible upper bound of forecasted revenue increases (based on ERFC's alternative optimistic forecast) would result in an additional \$1,343 billion for 2015-2017; and that the Council's proposal, or a variation of same, would be affordable if it were considered a priority by OFM and the Governor (U Ex. 90).

The State takes issue with the Council's recreation of the former model, the comparators, and applying the cost of living.

With respect to the model, it is the State's position that (1) the model or report relied upon is for assisted living, and (2) the benchmark costs used were costs of assisted living and nursing homes, not AFH.

State witnesses Joseph LaChance, Manager of Aging and Long-Term Support Services, testified that while the State did use nursing home costs as benchmarks in its 2004 study, it was only because the AFH providers would not provide cost data when asked. Also, the time study was used only as guidance by the State; it did not add up the benchmarks to arrive at a rate as done by the Council.

Further, the State takes issue with the use of the cost-of-living factor because of the nature of the AFH operation. Using the COL to update the 2011 figures to 2014 is inappropriate because the benchmark cost figures may increase or decrease irrespective of the CPI. As for past COL increases, the State argues that the Council, through collective bargaining, voluntarily agreed to the daily rates knowing what the COL was at the time.

Also, the State argues that the Individual Home Providers, the Child Care Providers and the Language Access Providers, relied upon by the Council, are not appropriate comparators to AFH because those providers are hourly employees with a wage rate; not an owner that receives a daily rate for its residents.

It is the State's position that the most important statutory factor to consider in this case is the State's ability to pay. Richard Pannkuk, Senior Budget Analyst testified about the State's past and present financial situation and the current budget. He did so in great detail and offered numerous exhibits in support thereof. It need not be repeated here, but can be summarized as follows.

The great recession hit Washington hard along with the rest of the country. Unlike previous recessions, job growth and revenue growth is slow. Past budgets were in deficit and needed repair. Over the last four years the State has reduced its budgets by \$11.8 billion. There were layoffs and wage freezes.

The Preliminary 2015-2017 Operating Budget Outlook is not good (S Ex. 3). Additional revenue is projected at \$2.6 billion, but expenses are projected at \$900 million more than revenue. This does not include the State's McCleary lawsuit obligation of \$1.2 billion - \$2 billion. In response to the Council's budget arguments, the State argues that it is highly unlikely that the State will pass substantial new revenue or that the Legislature will raid the budget stabilization account. The latter requires 60% approval by the Legislature which has been tried and failed in the past.

Based on all of the factors, the State believes that its proposed 5% increase is most appropriate and that the Council's 17.5% first-year increase in daily rates and 20% over the biennium to be totally inappropriate. The cost of the Council's proposal is \$90 million which is

unfeasible. The State disputes the Council's claim that there is an additional \$1 billion in the budget. It assumes optimistic budget outcome beyond revenue forecast and focuses on national data that ignores Washington's revenue collection climate.

As discussed earlier by the Arbitrator, the parties in support of their positions must rely on a number of statutory factors or criteria. The Arbitrator is also committed to those same factors. The statutory factors are the following: 1) the constitutional and statutory authority of the employer, 2) stipulations of the parties, 3) cost of living, 4) changes in circumstances during the pendency of the proceedings, 5) such other factors that are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment.⁷ In addition to these factors, the Arbitrator shall consider the financial ability of the State to pay for the compensation and benefit provision of a collective bargaining agreement.

There is no dispute between the parties regarding factors two and four; they are not relevant in this dispute. With respect to factor one, the constitutional statutory authority of the employer, the Council questioned whether the State was meeting its obligation of providing the services required to AFH and their clients. The Arbitrator finds no support for this claim. The State of Washington is recognized and continues to be considered as a leader in this field. There is no evidence to support a finding that the State is not meeting its obligations.

The relevant factors to consider then are 1) ability to pay, 2) cost of living, and 3) other factors. Each party has the burden of proof to establish their proposals to be the most reasonable as measured by the statutory factors.

⁷ With respect to this factor, it should be noted that collective bargaining for AFH providers is limited in scope as provided in RCW 41.56.029, (2), (c).

The parties are wide apart, to say the least, in the cost of their proposals. The State is at 5% increase for the biennium and the Council at a 17.5% first year increase and a 2.5% second year increase for approximately a 20% increase for the biennium. The wide difference between the proposals is driven by a difference in philosophical approach to establishing the AFH daily rates. The State's 5% is based on what it deems to be a reasonable increase because it meets the needs of Medicaid recipients and is especially reasonable in context of the State's financial and budget situation. The Council's approach is to adopt a model for determining the appropriate rates based on costs inherent in operating an Adult Family Home. The model is an updated version of the one used by the State in 2002. It is the model that generates the increases proposed.

At the outset, it is the Arbitrator's opinion that notwithstanding the merits of the Council's model, a 20% increase totaling \$90 million is simply extravagant and unreasonable, and, further, it would all but eliminate the collective bargaining of Medicaid rates. This is not to say that the rationale behind the cost model is faulty, but it is not realistic on a collective bargaining basis. The concept of what's feasible is a major consideration in collective bargaining which is determined by a number of factors including the merits of what's proposed, employers ability to pay, bargaining history, cost of living, and comparability with other internal settlements.

A good example of this is the fact that the Council voluntarily agreed to the rates in the last three contracts. This is the parties' first interest arbitration. In the past, the Council has voluntarily agreed to no increase in the daily rates. It's fair to assume that had the cost model been used, it would have generated at least some percentage increase. But, again, in collective bargaining all factors must be taken into consideration in arriving at a settlement. Undoubtedly,

the Council believed that an increase was appropriate, but given the financial condition of the State and its budget woes, a settlement at 0% was appropriate.

However, in this round of negotiations, the Council believes that its proposal is warranted and reasonable because of what it believes is a disconnect that has developed between the rates the original cost model would have generated and the rate established by the Legislature. The Arbitrator notes that what the Council is really seeking is what it deems "catch-up." But, even if there is a catch-up factor present, the Arbitrator believes the old adage that "You didn't fall behind in one contract so you can't expect to make it up in one contract" applies. This is not to say however that a rate increase between what has been proposed by the State and what has been proposed by the Council is not more appropriate as determined by the statutory criteria.

As stated earlier, the Arbitrator does not find reasonable the adoption of the proposed cost model because it results in an unrealistic increase of 20% over the biennium and because it all but replaces collective bargaining of the rates. The collective bargaining process takes in more factors than just costs. Further, as pointed out by the State the model is based on nursing home and assisted living costs, not AFH costs. The Council correctly counters that the State itself used nursing home costs in its 2002 time study. The State, however, credibly, explained that the reason the study was based on nursing home costs was because of the lack of AFH cost data. More importantly, however, it was used as a guide in establishing rates and not as an automatic calculation of rates based on the sum of the costs. The Arbitrator finds that the model suggested can best be used as guidance in determining rates along with the other factors normally considered in collective bargaining and required by statute.

Relevant Statutory Criterion

Cost of Living

We, of course, do not know what the cost of living figures will be for the term of the 2015-2017 collective bargaining agreement. For 2013 and 2014 (est.) , the increase in CPI will be about 3.7%.⁸ The State's offer of 5% for two years is in excess of the cost of living. The Council, however, argues that historically, over the last nine years, AFH rates have lost significant ground to the CPI and need to be addressed.

The State, in any event, takes issue with the relevancy of cost of living in this case. It is the State's position that rates are deemed appropriate if, by Medicaid standards, there is sufficient access to AFH beds for Medicaid residents at an acceptable level of quality. At current rates the standards are met (S Ex. 15, Navigant Report). Also, costs associated with operating an AFH may increase or decrease, so automatically applying the COL is not reasonable.

The State has some valid concerns about the Arbitrator's application of COL. The Arbitrator agrees with the State that it is difficult to assess the exact impact of the costs of AFH when the providers are reluctant to share cost data. However, the Arbitrator cannot ignore the impact of the CPI has on the AFH provider's operation. This is so because the basket of goods used to determine the CPI is equally applicable to the operation of an AFH as it is with other businesses and households. Certainly, the increase in the CPI to some degree has increased the cost of operating an AFH. The statutory COL factor cannot be ignored.

The Council argues that there is a trend underway now in the AFH business where homes are shutting down and beds being removed from the system. It claims closures are due in large part to the ever-increasing percentage of Medicaid patients in Adult Family Homes; the fact that

⁸ U Ex. 25, Seattle CPI-W

Adult Family Homes share a much higher relative percentage of residents with the highest and most complex acuity and needs; and at a rate of reimbursement for those clients that are simply not high enough for many homes to stay in business. The number of AFH continues to shrink.

The parties may disagree over the weight cost of living should be given, but it is a statutory criteria to be considered for Adult Family Homes. The Arbitrator notes that while the State's offer covers cost of living for the preceding two years, historically the cost of living far exceeded the AFH rate increase. Between 2005 and 2014, the CPI increased approximately 25% in contrast to the increase of only 3.98% in the "C medium" rate for AFH. From 2009-2014, when the Council negotiated its first agreement, the increase in the "C medium" rate was -2.22%.

Clearly, there is a wide gap between the cost of living increases and rate increases in the past nine years. The Arbitrator concludes that while the cost-of-living factor does not support the Council's proposal, it does support an increase in excess of the State's 5% offer.

Other Factors

Under this criterion, the Council argues that internal comparability is one of those factors "normally and traditionally taken into consideration" and therefore must be considered.

The Arbitrator agrees. One of the most common means of determining the reasonableness of the parties' proposals is to compare them with other unit employees of the same employer, especially in the public sector. This is so because in very general terms, there is a notion that all employees of an employer should be treated the equally. This is not a hard and fast principle and deviations can be made taking into consideration the circumstances, history, nature of work, and needs of each unit of employees.

Here, the Council proposes the following comparators: Individual Home Care Providers, Home Child Care Providers, and Language Access Providers.

The State opposes the use of internal comparables because it does not believe there are any comparable units of employees in its employ. It argues that the three units of employees proposed are all paid an hourly wage rate, unlike the AFH unit which is comprised of owners.

The Arbitrator disagrees although the State points out a valid distinction. The statute defines the AFH owners as “public employees” solely for the purpose of collective bargaining (RCW 41.56.029, (1) and (3)). The comparator group like AFH is made up of employees who are not traditional State employees, but like AFH have bargaining rights as “public employees” to bargain their compensation. Like AFH providers, they also provide community-based services to recipients. In the opinion of the Arbitrator, the three comparators are a meaningful, (although not a strict) comparison to the AFH unit. This comparison yields the following results. All three comparators far exceed AFH in increases for the period 2005-2014 and for the period AFH has been bargaining contracts. Comparing entry level wage increases, Individual Home Providers increases were about 17% higher (21.81% versus 3.98%) for the period 2005-2014. Child Care Providers between 2008-2014 had increases of about 9% while AFH had a decrease of 2.22%. Lastly, Language Access Providers for 2012-2014 received a total 8.23% increase versus 1.45% for AFH. Comparisons for only the period AFH begun bargaining is even more skewed. Further, the State in current negotiations with the individual home providers has offered a 7.5% increase for the biennium.

In assessing the value of these comparisons, the Arbitrator is mindful of the State’s position that the comparators are paid an hourly rate while the AFH owners are not. However, that statute allows all of the providers to bargain economic compensation. In both cases they are bargaining their compensation. In the final analysis, the Arbitrator does not find that all comparators must be treated equally. It does, however, provide a meaningful comparison. The

Arbitrator finds that the internal comparables support an increase of more than the State's 5% increase, but not the Council's 20% proposal.

Ability to Pay

The cost of living and other factors criterion while not favoring the adoption of the Council's proposal, does support an increase in excess of 5%. However, does the State's ability to pay (or inability to pay) support the State's 5% proposal and nothing more?

The burden of proof is upon the Employer. The position of the parties on this issue was discussed earlier and need not be repeated in detail.

Generally stated, the State argues that it has an estimated \$900 million deficit in excess of revenue forecast plus having to meet its obligation of \$1.2 - \$2 billion under the McCleary decision. It argues it does not have the ability to pay the Council's proposed 20% in rates over two years. In this regard, the Arbitrator, for reasons discussed earlier, agrees with the State that while Council's rationale behind its proposal – the updated cost model previously used – makes sense, the resulting daily rate increases generated by the model is unacceptable as simply too extravagant.

Also, it should be noted that, obviously, the State has the ability to pay its own 5% proposal. Its position regarding the ability to pay factor has been that it did not have the ability to pay the Council's 20% proposal. But how about its ability to pay something in between? The real issue, as viewed by the Arbitrator, is the State's ability to pay a package in excess of 5% if such an increase is deemed reasonable and appropriate based on the cost of living and internal comparability factors.

With regard to these two factors, COL and internal comparability, the Arbitrator finds that they support an increase of more than the 5% proposed by the State. While the 5% proposal

is in excess of the cost of living for a two-year period, historically – the last nine years – the cost of living has far exceeded the rate increase by about 22%. In this regard, the Arbitrator understands the State’s position that cost of living is not as important as the typical situation because of the difference between negotiating an hourly rate and negotiating a daily rate and the difference between an employee and an owner. The State believes the rate it proposes is reasonable because Medicaid recipients have no problem with access to AFH and quality care. On the other hand, AFH owners as “public employees” and for purposes of collective bargaining, have a right to bargain their compensation just as hourly employees do. This has to be taken into consideration in determining an appropriate rate increase. Further, over the years the percentage of Medicaid versus private residents has increased to where it is about 53% currently. AFT providers are paid less for Medicaid recipients than they are able to get for private residents. Also, the number of homes, as of January 1, 2014, decreased by 36 homes in one year, 74 homes in two years, and 123 homes in three years (U Ex. 68). There may be other factors that contribute to the reduction, but cost may be one of the reasons.

The “other factor” criterion, internal comparability, favors an increase in excess of 5% as well. As discussed earlier all of the comparables, Individual Home Providers, Home Child Care Providers, and Language Access Providers outpaced the AFH providers by approximately 17%, 11% and 6.8%, respectively (U Ex. 25). As mentioned earlier, this is not a perfect set of comparables but it does show how AFH providers have been treated differently than other community service providers who, like AFH providers, are not public employees except for the purposes of collective bargaining. Further, the State is in the midst of negotiations with the Individual Home Providers for a 2015-2017 collective bargaining agreement and has offered them a 7.5% increase for the biennium.

The Arbitrator concludes that an appropriate daily rate increase measured by the cost of living and internal comparability factors, favors the Council, but not its 20% proposal. More appropriate in the opinion of the Arbitrator is a 10% increase for the biennium, 5%, each year.

In reaching said conclusion, the Arbitrator is mindful of the State's position that the rates in question in the last three contracts were voluntarily agreed to by the Council. While this is true, collective bargaining is a reflection of the times and circumstances in play at the time. For instance, in determining what was appropriate a few years ago, the parties, undoubtedly, were influenced by the great recession at the time and its slow recovery. It certainly is not uncommon for employees to try and make up some of the sacrifices in ensuing years at a better time.

The question, then, is whether the State has an ability to pay the difference between a 5% and 10% increase in the daily rates.

What's clear to the Arbitrator is that there is much uncertainty in the 2015-2017 budget because it is still in the process of development. Experts testifying on behalf of the State and Council did an excellent job presenting their views on the budget. The State stresses the \$900 million deficit and potential \$1.2 - \$2 billion obligation under the McCleary decision. Further, the recovery from the recession is slow.

The Council disagrees, arguing that there is a very large sum of money in reserve, revenue outlook looks good, Legislature is likely to act to increase revenue, and the economy is recovering well.

Unfortunately, the budget is not simply an accounting matter. It is not an exact science. The budget is a matter of trade-offs and choices and assumptions. Do you count on the economy improving at a slow, modest or faster rate? All of these various and numerous considerations of projections and choices go into determining the State's ability to pay.

Here the Arbitrator is not convinced that the State does not have the ability to pay the difference between a biennium increase of 5% and 10%. It is undisputed that the economy nationally and in Washington is improving,⁹ so it could be that the revenues will come in higher than projected. Further, there is a large reserve, and while it is uncertain, the Legislature may approve its use if it has a willingness to do so. Lastly, the budget has earmarked \$600 million for “other obligations & policy options” which includes State employee increases including negotiated increases for represented employees (S Ex. 3). There are choices within the \$600 million to be made regarding the distribution of money set aside for employee compensation.

Based on the above, the Arbitrator concludes that the State has not established that it does not have the ability to pay a 5% increase in each of the two years of the biennium for a total of a 10% increase.

AWARD

Increase the 7.1 daily rates (Appendix A) by 5% effective July 1, 2015, and 5% effective July 1, 2016.

Issue No. 2. EXPANDED COMMUNITY SERVICE DAILY RATE

Both the State and Council increased this rate by the same percentage increases proposed for the Appendix A rates. The Arbitrator does the same.

AWARD

⁹ If the economy was in a decline, the Arbitrator would be inclined to agree with the State.

The Expanded Community Service Daily Rate shall be increased 5% each year of the 2015-2017 biennium.

Issue No. 3. SPECIALIZED BEHAVIOR SUPPORT ADD-ON RATE

The State proposes no increase in this rate. The Council proposes a 2.5% increase effective FY 2017 for Service Area Classification C Low (8) through E High (17). Those below level 8 already have a mood and behavior component to the rate.

The Council reasons that if two different residents who have both been assessed into the D High Care classification, but one of the two residents has severe assaultive behavior, it is obvious that, on the whole, the resident who regularly assaults people will take more time to provide care.

The State argues that it considers mood and behavior and gives an increased rate to residents who have a higher acuity or need one-on-one support or care. These residents at the higher levels already require acute care with or without mood and behavioral problems.

The Arbitrator does not find that the Council has met its burden of proof on this issue. The Arbitrator finds support of the State's position in that (1) the Council voluntarily agreed to the present system of payment for recipients with mood and behavioral problems and, assumingly, it reasonableness and 2) an Exception to Rule (ETR) can be requested if an individual's needs are different than a majority of individuals in the same care group.

AWARD

Maintain Status Quo. The Council has not met its burden of proof to establish that a change is needed.

Issue No. 4. BED HOLD RATE

The Washington Administrative Code requires providers to hold a bed for 20 days when a client is discharged to a nursing home or hospital. For the first seven days the provider is compensated at 70% of the daily rate. For the subsequent eighth through the 20th day, providers are compensated at \$15 a day.

The Council's proposal is to keep the payment rate at 70% for the first seven days and to increase the rate for the eighth through 30th day to 50% of the resident's daily rate. The Council's proposal not only increases the rate but also extends the time a bed must be held from 20 to 30 days.

The State has proposed status quo.

The Arbitrator finds the State's position more persuasive. The vast majority, 60%, return during the first seven days and 13% return between the eighth and 20th day. Only 1% return after the 20th day. 26% either die or are admitted to skilled nursing facilities. The Council's proposal would cost over \$500,000 for the biennium.

AWARD

Maintain Status Quo. Based on the above statistics, the Arbitrator agrees with the State that the Council's proposal is not needed and would not be an efficient use of State money.

Issue No. 5. HIV/AIDS

The State proposes to change the current HIV/AIDS Memorandum of Understanding that provides for a special added rate for the two HIV/AIDS non-profit homes (S Ex. 10). Its proposal is the following:

The parties agree:

1. Until June 30, 2014, the Department of Social and Health Services (DSHS) will continue to pay the AIDS/HIV special rates for AFH Medicaid clients at the Sean Humphrey House and the AIDS Housing Association of Tacoma.
2. Until June 30, 2015, DSHS will continue their current admissions procedures for AFH Medicaid clients at the Sean Humphrey House and the AIDS Housing Association of Tacoma.
3. All AFH Medicaid clients of the Sean Humphrey House and the AIDS Housing Association of Tacoma as of June 30, 2015, will be grandfathered in at the AIDS/HIV special rates for AFH Medicaid clients.
4. Beginning July 1, 2015, all new AFH Medicaid clients of the Sean Humphrey House and the AIDS Housing Association of Tacoma will be authorized for service at the rate assigned in CARE for the client's classification level.

The State's proposal would save \$161,436 for the biennium.

The Council's proposal is to basically keep the special rates for the two existing HIV/AIDS homes.

It is hard to access and evaluate the HIV/AIDS recipients and their needs. There is no question that the health and medical situation of those with HIV/AIDS has improved significantly. The rate of death has dropped dramatically and life expectancy has been extended dramatically. What's difficult to access, however, is the level of social stigma and acceptance of those with the disease.

There was a previous closing of HIV/AIDS homes (three) involving 18 residents. Five ended up in an institutional setting, two relocated with the other two HIV/AIDS homes, and eleven relocated to AFH. Seven of the 18 ended up in an institution or in a similar HIV/AIDS home. The dispersion of recipients does not convincingly establish that those with HIV/AIDS

feel comfortable in adult family homes. Some may, some not. Also hard to access is how such residents are received by other residents. Closure may be inevitable in the future, but more feedback from the residents would be helpful in making that decision.

AWARD

Maintain Status Quo.

Conclusion

Based on the foregoing facts and discussion thereon, the Arbitrator renders the following

AWARD

1. 7.1 and Appendix A.

Increase daily rates by five percent in each year of the 2015-2017 biennium.

2. Expanded Community Service Daily Rate

Increase rates by 5% each year of 2015-2017 biennium.

3. Specialized Behavior Support Add-On Rate

No Change

4. Bed Hold Rates

No change.

5. HIV/AIDS Memorandum of Understanding

No change.

6. To the extent permitted by law, the Arbitrator retains jurisdiction to arbitrate any suspended issues deemed to be mandatory subjects of bargaining by the Washington Public Employment Relations Commission.

Dated at Madison, Wisconsin, this 26th day of September, 2014.

Herman Torosian, Arbitrator

