

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

FILED

2016 APR 22 A 9:00

HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

In the Matter of:

The Form A and Form E Applications for the
Proposed Acquisition of Control of:

**GROUP HEALTH COOPERATIVE and
GROUP HEALTH OPTIONS, INC.,**

By

**KAISER FOUNDATION HEALTH PLAN
OF WASHINGTON**

Docket No. 16-0050

**SECOND ORDER: CASE
SCHEDULING, CONSOLIDATED
HEARINGS FOR FORM A AND
FORM E APPLICATIONS, AND
OTHER MISCELLANEOUS
MATTERS**

1. Adjudicative Hearing on Form E. On March 1, 2016, Kaiser Foundation Health Plan of Washington ("Kaiser") filed an application, or Pre-Acquisition Notification Form Regarding the Potential Competitive Impact of a Proposed Merger or Acquisition by a Non-Domiciliary Insurer doing Business in this State or by a Domestic Insurer ("Form E"), regarding its proposed acquisition of Group Health Cooperative ("GHC") and Group Health Options, Inc. ("GHO"). On March 31, 2016, when the parties filed their responses to the inquiries in the Washington State Insurance Commissioner's ("Commissioner's") First Order in this matter, the Commissioner was made aware of Kaiser's filing of the Form E. This was due to an oversight by the Office of Insurance Commissioner's ("OIC") Company Supervision Division ("Company Supervision"), who received the Form E at the same time as the Form A discussed in the First Order: Case Management Order ("First Order"), but inadvertently did not inform the Commissioner about it.

The OIC Case Status Report, which the OIC filed in this matter on March 31, 2016, indicates that on March 24, 2016, the OIC issued two separate requests for additional information and documents to Kaiser and GHC concerning both the Form A and Form E filed in this matter. The OIC's review of the Form E is governed by RCW 48.31B.020. RCW 48.31B.020(5)(a) states the Commissioner may not enter an order requiring an involved insurer to cease doing business in the state of Washington, or denying an application of an acquired or acquiring insurer to do business in this state, unless a hearing is held, and states:

(i) If an acquisition violates the standards of this section, the commissioner may enter an order:

(A) Requiring an involved insurer to cease and desist from doing business in this state with respect to the line or lines of insurance involved in the violation; or

(B) Denying the application of an acquired or acquiring insurer for a license to do business in this state.

(ii) Such an order may not be entered unless:

(A) There is a hearing;

(B) Notice of the hearing is issued prior to the end of the waiting period and not less than fifteen days prior to the hearing; and

(C) The hearing is concluded and the order is issued no later than sixty days after the filing of the preacquisition notification with the commissioner.

(iii) Every order must be accompanied by a written decision of the commissioner setting forth findings of fact and conclusions of law.

(iv) An order pursuant to this subsection (5)(a) does not apply if the acquisition is not consummated.

(Emphasis added).

RCW 48.31B.020(3)(b) explains that the waiting period begins on the date the Commissioner receives the Form E, and ends on the earlier of the thirtieth day after that date, or the Commissioner's termination of the waiting period. However, RCW 48.31B.020(3)(b) also indicates that prior to the end of the waiting period, the Commissioner may on a one-time basis require the submission of additional information relevant to the proposed acquisition. The OIC did so on March 24, 2016, by virtue of its request for additional information and documents regarding the Form E. In such circumstances, RCW 48.31B.020(3)(b) dictates that the waiting

period ends on the earlier of the thirtieth day after receipt of the additional information by the Commissioner, or the Commissioner's termination of the waiting period. In other words, the waiting period has not expired as to the Form E Kaiser filed in the instant matter.

Therefore, for the *sole* purpose of meeting the statutory deadlines governing a hearing concerning the Form E in the instant matter, I hereby tentatively schedule the hearing for April 29, 2016, beginning at 9 a.m., Pacific Time, at the OIC, 5000 Capital Blvd., Tumwater, Washington, **but in issuing this order immediately adjourn such proceeding (i.e., cancel it)** pursuant to RCW 48.04.010(1)(a) (the Commissioner's general authority to conduct hearings), RCW 48.04.060, and RCW 2.28.120, or other similar authority, in order to fulfill the scope of the requirements of the hearing intended by RCW 48.31B.020(5)(a).

2. Clarification of Standards Governing Confidentiality, Sealing, and Redaction of Records. At page 10 of the First Order mention is made of the *Ishikawa* factors outlined in *State v. Waldon*, 148 Wn. App. 952, 958, 202 P.3d 325 (2009), in the context of representatives of the parties asserting that documents filed with the Form A be sealed or redacted. Notwithstanding that, any discussion in First Order as to the confidentiality, or sealing and redaction of documents, applies with equal force in the context of the Form E. That said, *State v. S.J.C.*, 183 Wn.2d 408, 412, 352 P.3d 749 (2015) states whether an *Ishikawa* analysis is necessary depends on if Const. art. I, § 10 applies. Per the Court's holding in *Mills v. Western Washington Univ.*, 170 Wn.2d 903, 915, 246 P.3d 1254 (2011), this provision of the Washington State Constitution does not apply to quasi-judicial proceedings, such as the instant one before the OIC. Therefore, the *Ishikawa* factors outlined in *State v. Waldon*, 148 Wn. App. 952, 958, 202 P.3d 325 (2009) are inapplicable to determine whether documents concerning either the Form A or Form E should be sealed from public view or inspection, and not posted on the OIC's website. However, as the undersigned

mentioned at the status conference held on April 4, 2016, with the parties and their representatives, to supplement the authority listed on Page 10 of the First Order governing confidentiality, and sealing or redacting of documents or information concerning both the Forms A and E, the parties are also encouraged to examine the provisions in RCW Ch. 42.56, and the general authority for protective orders in CR 26(c) (and in particular subsection (7) therein that prevents disclosure of trade secret or other confidential research, development, or commercial information) applicable to adjudicative proceedings conducted by the OIC by virtue of WAC 284-02-070(2)(e)(i).

3. Consolidated Hearing on Forms A and E. During the status conference held in this matter on April 4, 2016, counsel for Kaiser indicated they objected to the OIC holding a consolidated hearing on the Forms A and E. RCW 48.31B.015(1)(c) requires that with respect to a transaction subject to that section (i.e., requiring a Form A), the acquiring person must also file a preacquisition notification with the Commissioner (i.e., Form E). See also WAC 284-18-360, -385.

At 2:7-14 of its “Brief in Opposition to Consolidation of Form A and Potential Form E Hearing” (“Opposition”), Kaiser asserts that the Form A and Form E statutes differ materially in the following respects:

Most significantly, **only** [RCW 48.31B.015] requires that the Commissioner hold a public hearing. RCW 48.31B.015(4)(a) and (b). Such hearing is required regardless of whether the Commissioner intends to approve or deny the proposed transaction. *Id.* . . . Conversely, a hearing is not universally required for Form E review. A hearing is only required on the Form E in the event the Commissioner intends to deny the application. In such a case, a hearing must be held prior to such denial. RCW 48.31B.020(5)(a)(ii). Thus, it is possible that no hearing will be required on the Form E in regards to this transaction.

(Brackets added).

Kaiser’s argument is flawed for the simple reason that it concludes that RCW 48.31B.015 requires something that RCW 48.31B.020 does not, most notably a hearing. However, as the

Commissioner articulates at pages 4-5 of the First Order, RCW 48.31B.015(4)(a) simply states that the Commissioner “shall approve a merger or other acquisition of control. . . unless, after a public hearing thereon, he or she finds that” one of the criteria listed in RCW 48.31B.015(4)(a) is present. In other words, the plain meaning of RCW 48.31B.015(4)(a) only requires a hearing if a merger or other acquisition of control is denied. Contrary to Kaiser’s statement at 2:8-9 of its Opposition, the plain meaning of RCW 48.31B.015(4)(a) does not require a hearing if the Commissioner approves a Form A. The standard governing Form E hearings in RCW 48.31B.020(5)(a)(ii) is no different. Like with the Form A statute above, RCW 48.31B.020(5)(a)(ii) only allows the Commissioner to enter an order requiring an involved insurer to cease and desist from doing business in the state of Washington with respect to the line or lines of insurance involved in the violation, or denying the application of an acquired or acquiring insurer for a license to do business in the state of Washington, if a hearing is held.

Kaiser’s assertion at 2:11-12 of its Opposition, that a “hearing is only required on the Form E in the event the Commissioner intends to deny the application,” misstates the plain meaning of RCW 48.31B.020(5)(a)(ii). As stated above, that statute simply states that if the Commissioner chooses to enter an order articulated in RCW 48.31B.020(5)(a)(i), then a hearing must be held. It does not state, as Kaiser asserts, that a hearing is only required on a Form E in event the Commissioner intends to enter such an order. In other words, the converse of the statutory language in RCW 48.31B.020(5)(a)(ii) is not necessarily true for the reasons articulated below.

The language of RCW 48.31B.020 does not mandate that a hearing *not* occur under certain circumstances. It only mandates that a hearing occur in certain circumstances. Contrary to what Kaiser states at 2:13-14 of its Opposition, as with the OIC’s consideration of the Form A, an adjudicative proceeding should occur on the Form E in this matter for reasons outside RCW Ch.

48.31B. WAC 284-02-070(1)(a) and (2)(a) require that hearings (adjudicative proceedings) of the OIC be conducted according to RCW Chs. 48.04 and 34.05, and WAC Ch. 10-08.

RCW 48.04.010(1) states that in addition to the Commissioner being required to hold a hearing if required by any provision of RCW Title 48, the Commissioner may also hold a hearing for any purpose within the scope of this code “as he or she may deem necessary.” Before the Commissioner can reach a conclusion that he will take negative action on either a Form A or Form E, under either RCW 48.31B.015 or RCW 48.31B.020 respectively, he must hold a hearing. Kaiser’s position on not consolidating adjudicative proceedings on both the Form A and Form E presumes that there is a circumstance where the Commissioner, as the Presiding Officer in this case, will render a decision on the proposed acquisition in this matter, and specifically the Form E, without holding a hearing to consider testimony and the evidence in this matter. This is not the case.

RCW 34.05.461(3) requires that final orders the Commissioner issues “shall include a statement of findings and conclusion, and the reasons and basis therefor, on all the material issues of fact, law, or discretion presented on the record.” (Emphasis added). This same provision also states: “Any findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified.” (Emphasis added). It is also beneficial for the Commissioner, and within his discretion under RCW 48.04.010(1), to conduct a hearing on both Forms A and E, and to do so in the same adjudicative proceeding. Both involve evaluation of some of the same criteria (i.e., RCW 48.31B.015 incorporates by reference criteria in RCW 48.31B.020 – see First Order, pages 4-5), and also must be filed together with the Commissioner. The Commissioner’s decision on both Forms is also potentially subject to judicial scrutiny.

RCW 48.31B.070(1) permits any person aggrieved by any act, determination, rule, order,

or any other action of the Commissioner under RCW Ch. 48.31B, to proceed in accordance with the RCW Ch. 34.05. RCW 34.05.530 states that a person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. Under RCW 34.05.570(3), the court shall grant relief from any an agency order in an adjudicative proceeding if it determines that:

- (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
- (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
- (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
- (f) The agency has not decided all issues requiring resolution by the agency;
- (g) A motion for disqualification under RCW 34.05.425 or 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
- (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency;
or
- (i) The order is arbitrary or capricious.

In addition, RCW 34.05.574(1) permits the court to remand a matter to an agency for further proceedings.

The risk of the Commissioner having his decision on the Forms A and E in this matter later overturned by the courts, or the matter remanded back to him for further proceedings, because his decision violates some provision of RCW 34.05.570(3) is far greater if he does not hold a hearing, during which he considers the testimony and evidence, and does not base his decision on such considerations. To reiterate, there is no language in RCW 48.31B.020 that prevents the Commissioner from holding a hearing on the Form E, even if he ultimately approves it.

Kaiser's mention, beginning at 3:10 of its Opposition, that the Form E is governed by stricter confidentiality provisions (RCW 48.31B.020(3) and RCW 48.31B.038) than the Form A, while true, also ignores the fact that RCW 48.31B.038 states that the "[C]ommissioner is authorized to use the documents, materials or other information" concerning the Forms A and E "in the furtherance of any regulatory or legal action brought as part of the [C]ommissioner's official duties." (Brackets added). The last sentence of RCW 48.31B.038 also gives the Commissioner discretion to publish all or portions of both the Form A (even portions arguably confidential under RCW 48.31B.038) and Form E, and supporting documents, if he deems it to be in the public interest:

. . . [A]fter giving the insurer and its affiliates who would be affected thereby, notice and opportunity to be heard, determines that the interest of policyholders, shareholders, or the public is served by the publication thereof, in which event the commissioner may publish all or any part in such manner as may be deemed appropriate.

(Brackets added).

As to Kaiser's concern at 4:22-23 of its Opposition, that there be "some mechanism to ensure that confidential information related to the Form E [be] shielded from the reach of all discovery requests and disclosures" (brackets added), to reiterate, as mentioned in Section 2 of this order, the mechanism is CR 26(c). CR 26(c) (and in particular subsection (7) therein that prevents disclosure of trade secret or other confidential research, development, or commercial information) is applicable to adjudicative proceedings conducted by the OIC by virtue of WAC 284-02-070(2)(e)(i). When appropriate, Kaiser can file a motion under CR 26(c) for a protective order regarding any Form E information or documents. There are instances of the OIC joining with counsel for an applicant on such a motion, and the OIC Presiding Officer granting such motion. See Order on Parties' Joint Submissions on Confidentiality Issues, issued on March 15, 2016,

OIC Docket No. 16-0027, which can be found at [https://www.insurance.wa.gov/laws-](https://www.insurance.wa.gov/laws-SECOND ORDER: CASE SCHEDULING, CONSOLIDATION OF APPLICATIONS, AND OTHER MISCELLANEOUS MATTERS - 8)

rules/administrative-hearings/judicial-proceedings/a-b/, under Arcadian Health Plan, Inc.

For the foregoing reasons, the Commissioner intends to hold a consolidated hearing on the Forms A and E in this matter at a later date, governed by the case schedule outlined in Section 7 below. The caption in this document has been changed to reflect that.

4. Emphasis on Kaiser's commitments in the OIC's Analysis of its Form A. In the Executive Summary filed with its Form A, Kaiser makes several commitments in addition to the \$1.8 billion of consideration that it will pay to Group Health Community Foundation ("GHCF"), a newly formed Washington non-profit corporation, including:

- Kaiser has no current plans to declare any extraordinary dividend, liquidate GHC or any of its subsidiaries, sell GHC's or any of its subsidiary's assets outside the ordinary course of business, or merge GHC or any of its subsidiaries with any third party;
- Kaiser has no current intention to make material changes in the business operations, corporate structure or management of GHC, except as discussed in the Form A, or as may arise in the ordinary course of business;
- In addition to the \$1.8 billion of transaction consideration it will pay to GHCF, Kaiser and its affiliates will spend an aggregate amount of \$1 billion in GHC and its subsidiaries during the first ten years following closing of the proposed transaction for capital improvements, key investments in infrastructure and other improvements to help ensure the success of GHC's charitable mission and continued provision of high quality health care;
- Kaiser will continue to operate GHC as a charitable organization, and in that vein expects to make \$800 million in community benefit investments in GHC's service areas over the same ten year period discussed in the preceding bullet point;
- At closing, Kaiser will appoint a board of directors for GHC that contains no less than one-third GHC enrolled participants or consumers substantially representative of the enrolled population of GHC;
- At closing, Kaiser will adopt corporate bylaws that require the creation of a Consumer Advisory Committee of at least 25 people to provide GHC's members with a meaningful opportunity to participate in matters of policy and operation, to promote the effective use of health care services within the organization, and to suggest ways that the organization can better service its members and the community as a whole;
- Following closing, Kaiser will continue to recognize and engage with special interest groups formed by GHC members, including the group known as the "GHC Senior Caucus"; and
- The proposed transaction will preserve the charitable non-profit mission of GHC, and endow a new community benefit fund (GHCF), with \$1.8 billion in assets.

The OIC, in evaluating these commitments by Kaiser, in the context of the Form A, must pay particular attention to RCW 48.31B.015(4)(a)(iv) and RCW 48.31B.015(4)(a)(ii)(B) (which incorporates by reference the criteria in 48.31B.020(4)(c)), and whether such commitments are realistic and in the public interest, or whether the public benefits of any substantial economies of scale or resource exceed the public benefits that would arise from not lessening competition.

5. Standard by which Kaiser's Form E is Analyzed. As to the Form E, at least one authorized representative of Kaiser and/or Kaiser Foundation Health Plan, Inc. ("Parent") (officers, directors, or in-house counsel are acceptable) and the OIC shall testify as to the criteria set forth in RCW 48.31B.020(4)(a), which provides that the OIC shall approve an acquisition if there is not substantial evidence that the effect of the acquisition may substantially lessen competition in a line of insurance in this state or tend to create a monopoly therein, and the insurer does not fail to file adequate information under RCW 48.31B.020(3). In determining whether the proposed acquisition violates this competitive standard, the OIC shall consider the criteria in RCW 48.31B.020(4)(b). RCW 48.31B.020(4) requires that the OIC not deny such an acquisition if (i) the acquisition will yield substantial economies of scale or economies in resource that cannot be feasibly achieved in any other way, and the public benefits that would arise from the economies exceed the public benefits that would arise from not lessening competition; or (ii) the acquisition will substantially increase the availability of insurance, and the public benefits of the increase exceed the public benefits that would arise from not lessening competition.

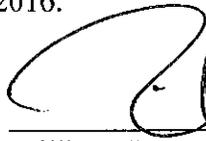
6. The OIC Pleading Signature Blocks. The OIC, in both its Case Status Report, filed in this matter on March 31, 2016, and its Position on Holding Consolidated Hearing, filed in this matter on April 12, 2016, electronically signs the Commissioner's name as submitting those pleadings, with staff in the Legal Affairs Division ("Legal Affairs") as his designee. This was

obviously an oversight. The Commissioner, as the Presiding Officer in this matter pursuant to Paragraph 4 of the First Order (Page 6), had no involvement in the filing of those OIC pleadings, and OIC staff in Legal Affairs did not do so as his designee. The Screening Protocol in place in this matter, discussed at Paragraph 5 of the First Order (Page 7), prohibits such involvement. Staff in Legal Affairs is instructed not to include the Commissioner's electronic signature on future pleadings.

7. Case Schedule. The parties and the undersigned were in agreement that the case schedule proposed by the undersigned at the April 4, 2016, status conference could be expedited assuming no interveners petitioned to be formally involved in any adjudicative proceedings in this matter pursuant to Paragraph 6 (Pages 8-9) of the First Order. That is the case. Therefore, the undersigned adopts the following case schedule (i.e., due dates) for this matter based upon a so-called Trigger Date ("T"), which in this matter is Company Supervision's final recommendation on whether to approve or disapprove Kaiser's Forms A and E:

Final Recommendation from Company Supervision on Forms A and E	T
Disclosure of Fact and Expert Witnesses	T + 4 (weeks)
Deadline for Discovery	T + 7
Parties' Witness and Proposed Exhibit Lists	T + 11
Parties' Hearing Briefs	T + 12
Hearing on Forms A and E Begins (1-5 Days)	T + 14
Deadline for Post-Hearing Submissions Including Proposed Orders	2 weeks
Commissioner's Decision	ASAP

It is so **ORDERED** this 2nd day of April, 2016.



William G. Pardee
Special Master

PROOF OF SERVICE

On the date given below I caused to be served the foregoing document on all parties or their counsel of record listed below.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 2nd day of April, 2016, at Tumwater, WA.


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