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NO. 70541-5-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON—OFFICE OF THE GOVERNOR,

Petitioner,

v.

PUBLIC EMPLOYMENT RELATIONS COMMISSION,

Respondent,

And

WASHINGTON FEDERATION OF STATE EMPLOYEES,

Intervener.

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**REPLY BRIEF OF PETITIONER**

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## I. ARGUMENT

### A. **Language Access Providers Contracted By DSHS Through a Language Access Agency Are Paid By State Appropriations Unlike Those Working In The Medicaid Administrative Match Program.**

WFSE argues the statute contains no requirement that language access providers working through a language access agency be paid by state funds. To support their argument they reason interpreters working under the brokerage system are not paid by DSHS but rather are paid by language access agencies. It is undisputed these language access agencies assist with the procurement of interpreters for certain Medicaid appointments wherein DSHS has assumed responsibility for this service. The legislature appropriates funds for this purpose and matching federal funds are also appropriated in the state budgetary process; that is, the federal funds are anticipated as a match to state appropriations and the anticipated receipt of those funds are reflected in the state appropriation.

When interpreter services are utilized for DSHS, the language access agency bills the broker, who in turn bills the state for reimbursement. The amount the language access agency pays to the interpreter is funded through state appropriations in direct contrast to the Medicaid Administrative Match program which receives no state appropriations.

**B. The Analogy To State Employees Administering The Medicaid Administrative Match Program Is Not Correct.**

WFSE argues since state employees administering the Medicaid Administrative Match program are properly included in their own bargaining unit and are not paid with state money, the Medicaid Administrative Match interpreters who receive no state funding can properly be in the new state bargaining unit for interpreters.

When state employees are paid by a federal grant, those employees still have another state employee overseeing their work. They also operate under state rules and guidelines including those relating to hiring, discipline, leave policies, employment status such as civil service or exempt appointments, benefits, state provided health care, and so forth. The state employees get a paycheck signed by the State of Washington. None of these factors are present regarding the relationship between DSHS and the interpreters working for the voluntary Medicaid Administrative Match participants. DSHS does not control the terms of employment of these interpreters, including what benefits are paid, what supervision and oversight is provided, the hours of work or work locations, and so forth.

As noted by the WFSE, the source of funds is traditionally not a criterion for determining whether someone is in a bargaining unit. They cite several PERC cases to support this proposition. Those cases deal with

situations where the positions in question had a direct employment relationship to the employer and presumably were subject to all employment rights, benefits and obligations associated with that relationship.

In the *Snohomish County* case cited, Fire District 1 was one of seven governmental bodies providing oversight and funding pursuant to an inter-local agreement to form an emergency management entity known as Medic 7. As noted by WFSE, the case did cite the proposition that programs can be funded by various sources. PERC ultimately ruled Fire District 1 was not an employer and they had no duty to bargain with the Medic 7 employees even though they provided some funding for the program. *Snohomish County Fire District 1*, Decision 6008 (PECB, 1997).

In the *Benton County* case cited, Benton County hired the interviewer and had authority over terms and conditions of employment; the interviewer was not a third party independent contractor. As pointed out in that decision, the focus is on the ability to control the terms of employment and pertinent facts indicate that Benton County was obligated to provide direct supervision of the position, to perform all administrative functions concerning the position and to determine benefits and related conditions of employment. *Benton County*, Decision 7651-A (PECB, 2002).

The *Kitsap County* case, Decision 4314 (PECB, 1993), also related to a situation where the position in question was part-time and was budgeted

differently than the full-time positions in the bargaining unit, thus leading to the employer's argument for exclusion of the part-timers. These cases are distinguishable from the third party Medicaid Administrative Match contractors in that the employees in question in these above cases were directly hired and supervised by the employer and were, in fact, the employer's employees.

The above cases stand for the proposition that simply because you do not get state money to fund a particular position does not mean the position cannot be in a covered bargaining unit. The reverse assumption can also be true; simply because you get a state pass through of federal funds to perform work does not mean the work is automatically in a covered bargaining unit. Simply because DSHS provides a pass through of federal money, it does not follow that they should be considered the employer for bargaining purposes. The analysis goes back to who controls terms and conditions of employment. The relationship between DSHS and the Medicaid Administrative Match participants is similar in nature to that described in *Kent School District*, Decision 2215 (PECB, 1985).

The *Kent* decision determined the School District, not ESD 101 (the funder) was the proper employer for bargaining purposes. The case described the relationship between ESD 101 and Kent as that of grantor to grantee when ESD passed federal money through to the school district. The

money was provided pursuant to federal Head Start program requirements. The federal agency and ESD determined the funding necessary for the Head Start programs. The participating agencies such as Kent were required to adhere to federal policies and performance standards as a condition of receiving federal funds.

The *Kent* decision noted ESD exercised control only over program standards and not over the employment relations of the constituent agencies such as Kent, and its (ESD's) interest was confined to ensuring program goals were met and federal requirements were followed. Similar to the *Kent* case, DSHS provides a pass through of federal money and monitors compliance with federal policies and requirements and they receive a fee for this administrative oversight. DSHS is not the appropriate agent for purposes of collective bargaining for interpreters in the MAM program.

**C. Language Access Agencies Are Compensated Pursuant To The Collective Bargaining Process Unlike MAM Participants.**

The WFSE argues Language Access Agencies are bound by the state's collective bargaining process without any reimbursement pursuant to that process. Therefore, if the interpreters contracting through a language access agency are undisputedly included in the bargaining unit, those in the Medicaid Administrative Match program are rightfully included as well.

On the contrary, the state collective bargaining process does determine the rate of hourly compensation when DSHS uses language access providers contracted through a language access agency. This compensation is paid for by the State using state and federal appropriations. The agreed upon amount is paid to the broker which is then passed through to the language access agency who procures the service and pays the state funded amount to the interpreter. This reimbursement of state appropriated funds does not occur for Medicaid Administrative Match participants.

## II. CONCLUSION

The State respectfully requests the Court determine PERC erred by including interpreters working in the Medicaid Administrative Match program in the State's collective bargaining unit, reverse PERC's Decision and enter judgment excluding these interpreters from the new bargaining unit.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of October, 2013.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury in accordance with the laws of the State of Washington that the original and one copy of the preceding Reply Brief of Petitioner was mailed through the United States Postal Service for filing and service at the following addresses:

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October 21, 2013

Richard D. Johnson, Court Administrator/Clerk  
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RE: *State of Washington-Office of the Governor v. Public Employment Relations  
Commission (Respondent) and Washington Federation of State  
Employees (Intervener)*  
Court of Appeals Division I Case No. 70541-5-I  
King County Superior Court Cause No. 12-2-24215-1 SEA

Dear Mr. Johnson:

Attached for filing is the Reply Brief of Petitioner (Certificate of Service is incorporated therein). A face sheet is included for conforming. A stamped self-addressed envelope is attached in which to return it. Copies have been mailed to opposing counsel as shown in the Certificate of Service.

Thank you.

Sincerely,

KARIN SKALSTAD  
Legal Assistant II  
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Attachments

c: Anita Hunter  
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10/23/13 11:16:17  
STATE OF WASHINGTON  
COURT OF APPEALS DIVISION I

