

Personal Care Attendant Working Group

Final Report

Submitted to Governor Dannel P. Malloy
pursuant to Executive Order #10

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Table of Contents

| | |
|--|----|
| Section 1: Executive Summary | 1 |
| Section 2: Research of Statutes of Other States | 2 |
| Section 3: Medicaid Waiver Program Benefits and Process | 9 |
| Section 4: Issues and Options for Resolution for Connecticut | 11 |

List of Appendixes

Appendix A: Executive Order #10

Appendix B: Research/Materials Received and Public Comment

Section 1: Executive Summary

On September 21, 2011 Governor Dannel P. Malloy issued Executive Order No. 10 (Appendix A). This Executive Order called for the creation of a Working Group charged with the task to

“...make recommendations on the best ways to structure collective bargaining rights and relationship for designated majority representative of personal care attendants to enable such representative to collectively bargaining the terms and conditions of the participation of personal care attendants in the PCA waiver programs.”

Within the framework set out by Executive Order No. 10, the working group was formed of key stakeholders: Dennis C. Murphy (Chair) *Deputy Commissioner, Connecticut Department of Labor*; Sandra Fae Brown-Brewton, *Assistant Chief of Labor Relations, Office of Policy and Management*; Kathy Bruni, *Medical Care Administration Program Manger, Connecticut Department of Social Services*; Lawrence Fox, *Consultant*; and Dr. Candace Howes, *Professor of Economics, Connecticut College*.

This working group has held public meetings during which it heard from key stakeholders and members of the public who expressed an interest in its work. Research and conference calls were made to inform the group.

For the purpose of clarity some key definitions laid out in the Executive Order are as follows (The entire Executive Order may be found in Appendix A):

- “Consumer” means a person who receives services from a personal attendant under a PCA waiver program.
- “Surrogate” means a consumer’s legal guardian or a person identified in a writer agreement as having responsibility for the care of a consumer.
- “Personal care attendant” means a person employed by a consumer or surrogate to provide personal care assistance to a consumer.
- “Personal care assistance” means supportive home care, person care or another nonprofessional service provided to a person with a disability or an elderly person who requires assistance to (A) meet such persona’ daily living needs, (B) ensure such person may adequately function in such person’s home, (C) provide such person with safe access to the community.

Section 2: Research of Statues of Other States

Introduction

This section reviews the relevant statutes from 4 states that currently have state-wide collective bargaining for home care workers (personal care aides)– Illinois, Massachusetts, Oregon and Washington –. Governor Malloy’s Executive Order 10 directs the PCA Working Group to

“...make recommendations on the best ways to structure collective bargaining rights and relationships for designated majority representatives of personal care attendants to enable such representatives to collectively bargain the terms and conditions of personal care attendants in personal care attendant waiver programs. In preparing its recommendations that group shall examine such systems as have been adopted in other states.”

This section summarizes relevant sections from the statutes which structure collective bargaining for home care workers and ensure that terms and conditions of employment can be set through collective bargaining (with protections of consumers’ rights to select, hire, fire and direct their workers). It reviews the collective bargaining relationships, including who the employer of record is, how that entity is formed, and what its responsibilities are in the collective bargaining relationship.

There are essentially two models – one represented by Illinois and Washington State – in which the state government itself is the employer of record solely for the purposes of collective bargaining, and the second in which a separate ‘entity,’ with representation from the single state agency responsible for Medicaid programs, perhaps other executive branch officials, and majority representation from consumers or their advocates, is the employer of record for that purpose. The primary focus of this summary is on the second model in which there is a separate entity that serves as the employer of record solely for collective bargaining purposes.

Principles:

1. Collective bargaining should be in sync with state’s Medicaid policy-making;
2. All stake-holders should be represented.

In general, the entities vary along the following dimensions:

1. How number 1 above is ensured through appointees to committee and appointment of chair/executive director;
2. How stake-holder representation is achieved.

Model 1 – The State itself is employer of record “solely” for collective bargaining purposes

Illinois: <http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=333&ChapterID=5>

Employer of record and public employee status

“Solely for the purposes of coverage under the Illinois Public Labor Relations Act (5 ILCS 315) [5 ILCS 315/1 et seq.], personal care attendants and personal assistants providing services under the Department's Home Services Program shall be considered to be public employees and the State of Illinois shall be considered to be their employer.

“The State shall engage in collective bargaining with an exclusive representative of personal care attendants and personal assistants working under the Home Services Program concerning their terms and conditions of employment that are within the State's control.

“The State shall not be considered to be the employer of personal care attendants and personal assistants for any purposes not specifically provided in this amendatory Act of the 93rd General Assembly [P.A. 93-204], including but not limited to, purposes of vicarious liability in tort and purposes of statutory retirement or health insurance benefits. Personal care attendants and personal assistants shall not be covered by the State Employees Group Insurance Act of 1971.”

Washington: <http://apps.leg.wa.gov/rcw/default.aspx?cite=74.39A>

Employer of record, collective bargaining and consultation with authority

“(1) Solely for the purposes of collective bargaining and as expressly limited under subsections

(2) and (3) of this section, the governor is the public employer, as defined in chapter 41.56 RCW,

of individual providers, who, solely for the purposes of collective bargaining, are public employees as defined in chapter 41.56 RCW. To accommodate the role of the state as payor for the community-based services provided under this chapter and to ensure coordination with state employee collective bargaining under chapter 41.80 RCW and the coordination necessary to implement RCW 74.39A.300, the public employer shall be represented for bargaining purposes by the governor or the governor's designee appointed under chapter 41.80 RCW. The governor or governor's designee shall periodically consult with the authority during the collective bargaining process to allow the authority to communicate issues relating to the long-term in homecare services received by consumers. The governor or the governor's designee shall consult the

authority on all issues for which the exclusive bargaining representative requests to engage in collective bargaining under subsections (6) and (7) of this section. The authority shall work with the developmental disabilities council, the governor's committee on disability issues and employment, the state council on aging, and other consumer advocacy organizations to obtain informed input from consumers on their interests, including impacts on consumer choice, for all issues proposed for collective bargaining under subsections (6) and (7) of this section."

Public Employees

"(2) Chapter 41.56 RCW governs the collective bargaining relationship between the governor and individual providers, except as otherwise expressly provided in this chapter and except as follows:

(d) Individual providers do not have the right to strike;

(3) Individual providers who are public employees solely for the purposes of collective bargaining under subsection (1) of this section are not, for that reason, employees of the state, its

political subdivisions, or an area agency on aging for any purpose. Chapter 41.56 RCW applies

only to the governance of the collective bargaining relationship between the employer and

individual providers as provided in subsections (1) and (2) of this section."

Consumer rights

"(4) Consumers and prospective consumers retain the right to select, hire, supervise the work of, and terminate any individual provider providing services to them. Consumers may elect to receive long-term in-home care services from individual providers who are not referred to them by the authority."

Home Care Quality Authority: <http://apps.leg.wa.gov/WAC/default.aspx?cite=257>

Membership: 9 members

- Appointed by Governor, Governor selects chairperson
 - 5 consumers or former consumers, at least 1 with developmental disability
 - 1 representative Developmental Disability Planning Council

- 1 representative from Governor’s Committee on Disability Issues and Employment
- 1 representative from State Council on Aging
- 1 representative from State Association of Area Agencies on Aging

Model 2 – Separate “entity” is employer of record “solely” for collective bargaining purposes

Two states covered in this section have entities which are variously referred to as a Council (MA) or a Commission (OR). Each has 9 members. All entities have majority representation by persons who are current or past consumers or their representatives. Appointments are made variously by the Governor, Agents of the Governor based on recommendations from interested Executive branch offices, usually Health and Human Services, Departments of Disability Services, including both physical, cognitive and developmental disability services, State Agencies of Aging, Area Agencies on Aging, and Councils on Aging, and Centers for Independent Living. The Chair of the entity is appointed by the Governor, and the executive director of the “entity” is usually appointed by the Governor or the Director of Human Services, or in one case, elected by members of the Entity. Terms of service are either 3 or 4 years.

Massachusetts – Personal Care Attendant Quality Homecare Workforce Council
<http://www.mass.gov/pca/>; Statute: <http://www.mass.gov/pca/about/statute.pdf>

Chair and executive Director: Governor appoints Secretary of Health and Human Services or his/her designee as chairperson; currently, Assistant Secretary for Disability Policies and Programs (Christine Griffin) is designee. Director is Jack Boesen
<http://www.mass.gov/pca/about/bio.htm> who has been in that position since 2007.

Membership: 9 members

- Appointed by Governor:
 - Secretary of Health & Human Services or designee – (Council Chair)
 - Director of Workforce Development
 - 1 consumer (from 3 recommended by) Governor’s Special Advisory Committee on Disability Policy
- Appointed by Auditor:
 - 1 consumer: Developmental Disabilities Council
 - 1 consumer: Massachusetts Office of Disability
 - 1 consumer: Independent Living Council

- Appointed by Attorney General:
 - 1 consumer or surrogate: MA Homecare Association
 - 1 consumer or surrogate: MA Council on Aging
 - 1 member at discretion of AG

Consumers’ rights:

“Consumers or the consumers’ surrogate retain the right to select, hire, schedule, train, direct, supervise and terminate any personal care attendant providing care to them. Consumers or consumers’ surrogate may elect to retain services from personal care attendants who are not referred to them by the council.”

Employer of record: Council is employer of record as defined by and solely for purposes of said chapter 150E and Sections 17A, 17G and 17J of said chapter 180.¹

Homecare workers’ rights:

As specified in public employee statute Ch 150E

Public employee status:

“Personal care attendants shall be considered public employees, as defined by and solely for the purposes of, chapter 150E and section 17J of chapter 180. Said chapter 150E shall apply to personal care attendants except to the extent that chapter 150E is inconsistent with this section, in which case this section shall control. In addition, personal care attendants shall be treated as state employees solely for the purposes of sections 17A and 17G of chapter 180. Personal care attendants shall not be considered public employees or state employees for any purpose other than those set forth in this paragraph.”

“Personal care attendants shall not be eligible for benefits through the group insurance commission, the state board of retirement or the state employee workers' compensation program.”

“(c) Personal care attendants who are employees of the council under this section are not, for that reason, public employees or employees of the council for any other purpose.”

Strikes and work stoppages:

“Consistent with section 9A of chapter 150E, no personal care attendant shall engage in a strike and no personal care attendant shall induce, encourage or condone any strike, work stoppage, slowdown or withholding of services by any personal care attendant.”

¹ Chapter 150E refers to the Public Employees Labor Relations Statute and Chapter 180 is the statute authorizing dues/fees deductions.

Oregon – Oregon Home Care Commission <http://www.oregon.gov/DHS/spd/adv/hcc/>; Statute: <http://www.leg.state.or.us/ors/410.html>

Chair and Executive Director: Chair of Commission selected by Governor; Executive Director appointed by Director of Human Services in Consultation with Governor and subject to Commission approval (Executive Director is Cheryl Miller)

Membership: 9 members

- Appointed by Governor and confirmed by Senate, Governor selects chairperson (who is currently a consumer)
 - 5 consumers or former consumers
 - 1 representative of Governor’s Commission on Senior Services
 - 1 representative Department of Human Services
 - 1 representative Oregon Disability Commission
 - 1 representative Area Agencies on Aging

Consumer’s rights:

“410.608 Selection of home care worker; right to terminate employment; eligibility determination made by Department of Human Services.

(1) An elderly person or a person with a disability who hires a home care worker has the right to select the home care worker, including a family member.

(2) An elderly person or a person with a disability who hires a home care worker has the right to terminate the employment of the home care worker at any time and for any reason.

(3) The Department of Human Services shall determine the eligibility of an elderly person or a person with a disability to receive home care services under the Medicaid program and state-funded long term care services. [2001 c.901 §5; 2007 c.70 §181]”

Employer of record:

“**410.612 Collective bargaining.** (1) For purposes of collective bargaining under ORS 243.650 to 243.782, the Home Care Commission is the employer of record for home care workers.

(2) Notwithstanding subsection (1) of this section, home care workers may not be considered for any purposes to be an employee of the State of Oregon, an area agency or other public agency.

(3) The Oregon Department of Administrative Services shall represent the commission in collective bargaining negotiations with the certified or recognized exclusive representatives of all appropriate bargaining units of home care workers. The department is authorized to agree to terms and conditions of collective bargaining agreements on behalf of the commission and the Department of Human Services. [2001 c.901 §6]”

Homecare workers rights, public employee status, no right to strike:

“ **410.614 Rights of home care workers.** Notwithstanding ORS 243.650”

Section 3: Medicaid Waiver Program Benefits and Process

Overview of Medicaid Waivers:

Medicaid waivers defined in Section 1915c of the Social Security Act allows the state to apply to The Centers for Medicare and Medicaid Services (CMS) to provide home and community based services to Medicaid recipients that are not otherwise available under the Medicaid state plan. Under a waiver, the states may ask to waive comparability and/or state wideness but also may utilize the institutional Medicaid eligibility criteria that allows for persons with higher incomes to qualify for Medicaid under the waiver. Spousal assessment of asset limits also applies to waiver participants. Waivers are available only to persons at an institutional level of care such as Nursing Facility, Intermediate Care Facility for persons with mental retardation or Chronic Disease Hospital. In other words, but for the provision of waiver services, the person would be institutionalized.

There are currently eight Medicaid Waiver programs operating with several new ones in various stages of development. All of the waivers have individual cost caps specified in the waiver. Most are one hundred percent of the cost of institutional care, one is one hundred twenty five percent and one is two hundred percent. Additionally, the waiver must be cost neutral to the state. The waiver services plus Medicaid state plan services for waiver participants must be equal or less than the cost of institutional care and state plan services provided to persons who are institutionalized.

The Executive order impacts the provision of self directed services in the three waivers for Department of Developmental Services' clients and the Elder, Personal Care Assistant and Acquired Brain Injury DSS Waivers. The services addressed in the Executive order are self directed services which are defined by CMS as the waiver participant having the authority to exercise decision making authority over his/her waiver services. Participant direction promotes personal choice and control over the delivery of services including who provides services and how they are delivered. They are afforded the opportunity to be supported to recruit, hire and supervise individuals who furnish daily supports.

Development of the Plan of Care:

Each of the waivers has a case manager whose role it is to develop a person centered plan of care that addresses individual strengths, preferences and unmet needs. The service plan that is developed is driven by the consumer. The plan for which the individual applies must be within the cost caps of the waiver. If a plan cannot be developed within the cost caps of the waiver program then the person is not eligible for services under the waiver.

Payment Structure:

All self directed services offer the assistance of a fiscal intermediary. The fiscal intermediary maintains a registry of PCAs, trains the participants in self direction, completes

criminal background checks on all persons applying to be PCAs, identifies and investigates fraud allegations and provides ongoing support and consultation to participants on their responsibilities as an employer. The participant establishes the pay rate to the PCA up to the maximum rate established by the Department of Social Services. Currently, the Medicaid rate is \$13.80 per hour that includes all of the employer payroll taxes. The maximum pay rate for PCAs can be up to \$12.38/hour.

Participants know best what their needs are and how they want their care provided so they are responsible for training the PCAs.

Section 4: Issues and Options for Resolution for Connecticut

In discussing the issues presented by the existence of collective bargaining for personal care attendants (PCAs), the Working Group was influenced by a set of guiding principles. These are as follows:

Guiding Principles

- PCAs funded through the Medicaid waiver programs are not and should not be considered employees of the state,
- The dignity of the consumer and the right of self-direction is paramount. Therefore, providing for collective bargaining of PCAs will in no way be construed to affect the rights of the consumer or surrogate to hire or refuse to hire, supervise, direct the activities of, and terminate the employment of any PCA,
- The composition of the bargaining representatives for the state should include members of the executive branch responsible for administering the Medicaid waiver programs to ensure meaningful dialog and agreements consistent with the public goals and policies of the programs,
- In light of program funding restrictions, the structure of collective bargaining should be viewed with the goal of maintaining or expanding upon the current levels of services provided to the consumer.

1. Definition of the bargaining unit

Executive Order Number 10 addresses “...personal care attendants who are paid through various programs administered by the Department of Social Services and Department of Developmental Services designed to enable low-income residents to continue living at home, instead of living at a nursing home or other institutional care facility.” (Exec Order 10, Section 1. a, attached hereto, cites the statutory basis for PCA waiver programs).

The collective bargaining unit, therefore, is defined as a state-wide unit of all PCAs who provide services under programs administered by the Department of Social Services, a state-wide unit of PCAs who provide services under programs administered by the Department of Developmental Services, or a combined unit.

2. Management Negotiating Entity

Executive Order Number 10 states that under the meet and confer process, the management entity consists of a Personal Care Attendant Quality Home Care Workforce Council. This Council consists of seven members: the Commissioner of Social Services, Commissioner of Developmental Services, and the Healthcare Advocate or their

designees. The remaining four members are appointed by the Governor and include consumers or their surrogates and advocates for the elderly and people with disabilities.

Maintaining such an entity as this Council as the “management” entity is an option for consideration.

3. Labor Relations Regulatory Oversight

Although the Municipal Employees Relations Act (Sec. 7-467 et seq) and the Connecticut Labor Management Relations Act (Sec.31-101 et seq) theoretically may be used as the basis for regulatory oversight, the Working Group is of the opinion that the State Employee Relations Act (Sec. 5-270 et seq) is the best suited option for regulatory oversight. PCAs would constructively be covered employees solely for purposes of the legislation and regulatory jurisdiction, as modified.

In order to ensure the integrity of self-determination of the consumer or surrogate, an option would be to limit the State Board of Labor Relations remedial authority’s application to the state and any collective bargaining agent and not as to the consumer or surrogate.

The state board would exercise when appropriate its administrative authority to regulate any future petitions for decertification/certification and regulate any subsequent elections pursuant to their regular process.

A variety of options are available in the attempt to define the effects and process of collective bargaining.

One option would be to provide that the provisions of Sec. 5-276a providing for binding interest arbitration is not a process available to the parties, and that any negotiated agreement is subject to the state’s regular budgetary approval process, subject to funds being made available and subject to affirmative legislative approval. Should impasse be reached during negotiations, and after mediation, this option would provide for a fact-finding process. The fact-finder would provide non-binding recommendations to the parties for settlement. And, as previously stated, the results of any collective bargaining would be subject to the state’s regular budgetary approval process, subject to funds being made available, and subject to affirmative legislative approval.

Another option would be to provide for an interest arbitration process with no limitation on the subjects to be considered, but the results would be subject to the state’s regular budgetary approval process, subject to funds being made available, and subject to affirmative legislative approval.

In light of the guiding principle that current levels of services provided should be maintained or expanded, it becomes essential that the approval processes as identified be adopted. The fear that a “zero-sum” game looms (i.e.: that any increase in costs will result in a decrease of services) can be allayed by ensuring that informed negotiators, including consumers, are involved, and that the bargained results be made subject to approvals as identified. These safeguards also apply toward protecting the required cost neutrality of the waiver programs.

Although already stated in the State Employees Relations Act, an option may be to affirmatively state that PCAs do not have the right to strike.

An additional option may be to include an affirmative statement which declares that nothing in the Act in any way impairs the right of PCAs to directly lobby, petition and communicate with any governmental entity. This would prevent any successful argument that these would amount to a prohibited practice for the state to deal directly with PCAs.

4. Appropriate Subjects for Collective Bargaining

To support the guiding principle that PCAs are not state employees, an option may be to provide that it is an unlawful subject of bargaining to demand that PCAs be entered into the state employee benefits system, including both its health benefits and its pensions.

Another option would be to make clear that PCAs are not eligible for benefits as state employees, but that providers and their representatives may negotiate for any fringe benefits, subject to the necessary approval processes.

To protect the right of self-direction of the consumer and surrogate, an option is to declare as a prohibited subject of bargaining a grievance procedure which encompasses disputes, of any nature whatsoever, between a PCA and the consumer and/or surrogate.

An option would be to allow the parties to negotiate any such grievance procedure, subject to the approval processes.

Another option may include allowing for all subjects or certain subjects to be appropriate for a grievance to proceed to an arbitrator who is authorized to issue an opinion which is final and binding on the parties.

The right of self-direction of the consumer may also be affected by collectively bargained wages. Currently, consumers can set the wages at a point less than the maximum hourly benefit allowed. This allows for consumers to provide for increases

over time. The Working Group is mindful that a balance needs to be struck between the union's strong interest in protecting the PCA from unreasonably low or unfair wages, and the consumer's right to manage the benefit that has been conferred upon them. An informed balance in this regard can be safeguarded by the "management" negotiating entity being led by the agencies directly charged with administering the programs, the inclusion of consumers on the negotiating team, and the budgetary and legislative approval processes in place.

Training provides another topic of negotiations where a balance must be struck between the union's interest in securing training for the safety and advancement of PCAs, and the consumer's right to train the PCA to the consumer's individualized needs.