1145 Broadway, Suite 300
Tacoma, WA 98402

September 22, 2021

The Honorable Mike Kreidler
Insurance Commissioner
State of Washington
PO Box 40255
Olympia, WA 98504 -0255

ATTN: Rules Coordinator

RE: CR-102 for R 2021-09, Administrative Hearing- Optimizing Discovery and Authorizing Electronic Services, Comments from Coordinated Care Corporation, NAIC# 95831

Dear Commissioner Kreidler:

We write to express our concerns with OIC's proposed rulemaking CR-102 governing discovery rules for administrative hearings. The proposed rule will categorically limit the availability of potentially relevant and material information in adjudicative proceedings, severely hindering interested parties' ability to obtain a "fair trial in a fair tribunal" as required by the Fifth and Fourteenth Amendments' due process clauses, the Washington Constitution, and the Washington Administrative Procedure Act. *Neravetla v. Dep't of Health*, 394 P.3d 1028, 1041 (Wash. Ct. App. 2017) (quoting *Withrow v. Larkin*, 421 U.S. 35, 46 (1975)); *Matter of Johnston*, 663 P.2d 457, 461–64 (Wash. 1983) (en banc); RCW 34.05.437. We urge you to abandon or reconsider this rulemaking.

The proposed rule imposes strict limitations on discovery in all hearings in front of the OIC's internal hearing officer, including all adjudicative proceedings. As WAC 284-02-070 makes clear, these adjudicative proceedings include contested case hearings concerning matters such as license revocations, certificates of authority, and registrations, and the hearings may result in or from the levying of fines against persons or organizations. WAC 284-02-070(a), (c). Because adjudicative hearings subject to the proposed rule may relate to license revocations and fines, parties in these hearings are entitled to the protections of due process. U.S. Const. amend. XIV § 1; *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *LK Operating, LLC v. Collection Grp., LLC*, 331 P.3d 1147, 1155 (Wash. 2014) ("Governmental restrictions on or deprivations of one's professional license clearly implicate interests subject to due process protections."). At its core, due process requires a "fair trial in a fair tribunal." *Withrow*, 421 U.S. at 46. The proposed rule creates a serious risk that parties' due process rights will be violated by categorically limiting the availability of basic discovery materials. *See McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979) ("[D]iscovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process."); *Jones Total Health Care Pharmacy, LLC v. Drug Enforcement Admin.*, 881 F.3d 823, 834–35 (11th Cir. 2018); *Pac. Gas & Elec. Co. v. FERC*, 746 F.2d 1383 (9th Cir. 1984) (noting agencies must ensure that discovery procedures meet due process requirements).

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Not only must agency adjudications be fair in fact to satisfy due process, agency adjudications in Washington must also *appear* to be fair. *Family of Butts v. Constantine*, 491 P.3d 132, 150–51 (Wash. 2021). Quasi-judicial agency adjudications are invalid if the agency "has employed procedures that created the appearance of unfairness." *Id.* at 150. Broad restrictions on parties' ability to access potentially relevant and material information in discovery will force parties to proceed on an incomplete administrative record. It is the epitome of unfairness for one party—under the proposed rule, the agency—to have access to information and pre-hearing testimony that the other party does not have. That is precisely what this rule does by precluding depositions. Without the ability to depose the key fact witnesses, it becomes trial by ambush. That is the antithesis of a fair proceeding.

Relatedly, by limiting a party's ability to obtain basic discovery materials, the internal hearing officer cannot "give all parties full opportunity to submit and respond to pleadings, motions, objections, and offers of settlement," as required by the Administrative Procedure Act, without taking a leading role in policing and micromanaging the discovery process. RCW 34.05.437(1). Rather than advancing the proposed rule's goals of avoiding delays and achieving administrative efficiencies, the proposed rule's discovery restrictions will lead to increased motions practice relating to routine discovery requests that would otherwise proceed without delay. By capping and restricting parties' access to basic discovery materials absent an express decision of the hearing officer, adjudications will stall during the discovery process while hearing officers are tasked with making the necessary findings and rulings to ensure the parties receive their "full opportunity to submit and respond to pleadings, motions, objections, and offers of settlement." RCW 34.05.437(1).

Moreover, hearing officers presently have significant authority to address OIC's stated concerns regarding discovery abuses, and therefore the proposed rule's expansive discovery restrictions are unnecessary. *See* WAC 284-02-070(2)(e)(ii)—(iii). Under the existing rule, parties who abuse the discovery process may be subject to sanctions up to and including "the drastic sanction" of dismissal of the matter. *Rivers v. Wash. State Conf. of Mason Contractors*, 41 P.3d 1175, 1186 (Wash. 2002) (en banc); WAC 284-02-070(2)(e)(ii). The hearing officer is therefore able to address any discovery abuses as they may arise in a given case. The hearing officer's authority to sanction parties that abuse the discovery process, on a case-by-case basis, encourages efficiencies that will be lost under the proposed rule.

In sum, the proposed rule will create difficulties and inefficiencies in comporting OIC hearings to the requirements of due process and actual and apparent fairness. We encourage you to reconsider the proposed rule.

Sincerely,

Beth Johnson, President and CEO
Coordinated Care of Washington, Inc.

cc: Maren R. Norton, JD, Stoel Rives
Sharhonda Shahid, Senior Corporate Counsel, Centene Corporation
Sheila Nishimoto, VP, Compliance