

No. 37157-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

FILED  
COURT OF APPEALS  
DIVISION II  
03 JUN -14 PM 12:11  
STATE OF WASHINGTON  
BY *[Signature]*  
CLERK

---

MULTICARE HEALTH SYSTEM,

Petitioner/Appellant,

vs.

DEPARTMENT OF HEALTH OF THE STATE OF WASHINGTON

and

FRANCISCAN HEALTH SYSTEM,

Respondents

---

**MULTICARE'S REPLY BRIEF**

---

DORSEY & WHITNEY LLP  
Peter S. Ehrlichman, WSBA #6591  
Brian W. Grimm, WSBA #29619

U.S. Bank Centre  
1420 Fifth Avenue, Suite 3400  
Seattle, Washington 98101  
Telephone: (206) 903-8800  
Facsimile: (206) 903-8820

Attorneys for Petitioner/Appellant,  
MultiCare Health System

**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ARGUMENT..... 3

    A. IF THE 20-DAY DEADLINE IN WAC 246-10-203(1)(A)(III) APPLIES, FRANCISCAN’S APPLICATION WAS UNTIMELY (REGARDLESS OF WHETHER FRANCISCAN WAS APPEALING FROM THE JANUARY 12 DNR OR THE JUNE 6 LETTER). ..... 3

        1. The Court reviews the interpretation of a regulation de novo. .... 3

        2. The Administrative Procedure Act and the Department’s regulations are designed to create clear, consistent procedures for timely agency action. .... 4

        3. The 20-day deadline set forth in WAC 246-10-203(1)(a)(iii) applies in this proceeding. .... 5

        4. Franciscan did not file its application within twenty days. .... 8

        5. Because there was no timely application, the HLJ did not have jurisdiction to review the DNR. .... 9

    B. IF THE AGENCY ACTION BEING APPEALED WAS THE JANUARY 12, 2006 DNR, FRANCISCAN’S APPLICATION WAS UNTIMELY (REGARDLESS OF WHETHER THE DEADLINE WAS TWENTY OR TWENTY-EIGHT DAYS)..... 10

    C. IF THE SCOPE OF THE CLOSED ASC EXEMPTION IS DERIVED FROM THE PLAIN LANGUAGE OF THE REGULATION, MULTICARE DAY SURGERY IS EXEMPT FROM CN REVIEW. .... 17

III. CONCLUSION ..... 24

**TABLE OF AUTHORITIES**

CASES

Cobra Roofing Service, Inc. v. Department of Labor & Industries,  
122 Wn. App. 402, 97 P.2d 17 (2004) .....3, 17

Department of Licensing v. Cannon,  
147 Wn.2d 41, 50 P.3d 627 (2002) .....17, 18, 22

Erection Co. v. Department of Labor and Industries,  
121 Wn.2d 513, 852 P.2d 288 (1993) .....10

Rust v. Western Washington State College,  
11 Wn. App. 410, 523 P.2d 204 (1974) .....10

STATUTES

RCW 34.05.001 .....4

RCW 34.05.010 .....8

RCW 34.05.413 .....5

RCW 34.05.440 .....9, 14

REGULATIONS

WAC 246-10-203 .....passim

WAC 246-310-010 .....passim

WAC 246-310-050 .....4, 11, 15

WAC 246-310-610 .....6, 7

FEDERAL STATUTES AND REGULATIONS

42 C.F.R. 411.352(a) .....19, 21, 22

Medicare and Medicaid Programs; Physicians' Referrals to Health  
Care Entities With Which They Have Financial Relationships,  
Comments, 63 Fed. Reg. 1687 (rule proposed Jan. 9, 1998; to be  
codified at 42 C.F.R. Parts 411, 424, 435, and 455) .....20

OTHER AUTHORITIES

William R. Andersen, The 1988 Washington Administrative  
Procedure Act—An Introduction, 64 Wash. L. Rev. 781 (1989)..... 4

Alice G. Gosfield, The New Playing Field, 41 St. Louis U. L.J. 869  
(1997) .....21

## I. INTRODUCTION

The Court should reverse the HLJ's Final Order, and reinstate the Program's DNR, if it concludes that: (1) the 20-day deadline set forth in WAC 246-10-203(1)(a)(iii) applies to Franciscan's application for an adjudicative proceeding; *or* (2) the agency action being appealed by Franciscan was the Program's January 12, 2006 DNR determining that MultiCare Day Surgery was exempt from CN review, not its June 6, 2006 letter proscribing use of the facility by additional physicians; *or* (3) the facility falls within the Closed ASC Exemption set forth in WAC 246-310-010(5). Although the Court *need* reach only one—*any* one—of these conclusions to mandate reversal, it *should* reach all three.<sup>1</sup>

The 20-day deadline is the “residual” adjudicative-proceeding filing deadline governing “all other matters” for which no other deadline specifically applies. Where there is such a residual deadline, explicitly covering “all other matters,” it is unnecessary to look to “analogous” deadlines as Franciscan attempts to do. Even if the Court determines that Franciscan was appealing from the June 6, 2006 letter, rather than the January 12, 2006 DNR, Franciscan's application was not filed within twenty days of service of that letter. Accordingly, no adjudicative proceeding was timely commenced and the Department did not have jurisdiction to conduct one.

---

<sup>1</sup> Terms are used in this Reply Brief as they were previously defined in MultiCare's Opening Brief (“MHS Op. Br.”).

The January 12, 2006 DNR is the agency action in this case. This was the Department's determination that MultiCare Day Surgery—as described in MultiCare's December 14, 2005, application for a determination of non-reviewability—was not subject to CN review. This determination was never revoked or reconsidered by the Department. And, it is this determination that Franciscan objects to and sought to have reversed. The June 6, 2006, letter, by comparison, relates to whether MultiCare Day Surgery would continue to be exempt from CN review if the facility were to be made available to surgeons other than the full-time members of the private practice, MultiCare Medical Associates, identified in MultiCare's application and the Program's DNR. In this letter, the Program informed MultiCare that MultiCare Day Surgery would *not* continue to be exempt from CN review under such circumstances. Franciscan *requested* this clarification, Franciscan had no objection to it, and Franciscan did not appeal it. Therefore, even if the deadline to appeal was twenty-eight days, rather than twenty-days, Franciscan's July 3, 2006 application was untimely, as it was filed nearly six months after the Program's January 12, 2006 DNR.

Finally, even if the Court determines that Franciscan filed a timely application for adjudicative review, the Court should reverse the HLJ's Final Order and reinstate the Program's DNR. MultiCare Day Surgery falls within the Closed ASC Exemption set forth in WAC 246-310-010(5) if that regulation is interpreted based on its "plain language." Only if new limitations are added to the Closed ASC Exemption, which appear

nowhere in the language of the regulation, and which historically have never been imposed by the Department with respect to other facilities, virtually identical to MultiCare Day Surgery in all material respects, can MultiCare Day Surgery be said to not fall within the Closed ASC Exemption. The HLJ misinterpreted the regulation by adding these additional limitations, and the Court should correct that legal error.

MultiCare respectfully requests that the Court reverse the HLJ's Final Order, and reinstate the Program's DNR, on any one—or all three—of these grounds.

## II. ARGUMENT

### A. **If The 20-Day Deadline In WAC 246-10-203(1)(a)(iii) Applies, Franciscan's Application Was Untimely (Regardless Of Whether Franciscan Was Appealing From The January 12 DNR Or The June 6 Letter).**

#### 1. The Court reviews the interpretation of a regulation de novo.

Whether the 20-day deadline of WAC 246-10-203(1)(a)(iii) applies to an application for an adjudicative proceeding relating to the issuance of a DNR is not a "factual finding," as Franciscan suggests. Franciscan Health System's Response Brief ("FHS Br.") at 27. The interpretation of a regulation is an issue of law, reviewed by the Court de novo. Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus., 122 Wn. App. 402, 409, 97 P.2d 17 (2004). Interpretation of a filing deadline is not the type of issue for which the Department of Health possesses "specialized knowledge and expertise" that the Court should defer to; to

the contrary, this is a routine issue of regulatory interpretation, which this Court is better suited to conduct than is an administrative agency.

2. The Administrative Procedure Act and the Department's regulations are designed to create clear, consistent procedures for timely agency action.

Among the Legislature's goals in adopting the 1988 APA was achieving greater *clarity* and *consistency* in administrative procedures. See RCW 34.05.001 (Legislative intent); see generally William R. Andersen, The 1988 Washington Administrative Procedure Act—An Introduction, 64 Wash. L. Rev. 781 (1989) (discussing legislative intent). The APA itself and the Department's regulations serve these objectives of clarity and consistency, as well as a third objective—*timely* resolution of issues.

The Department has created a specific, formal procedure for a party to request and obtain a determination of non-reviewability. Under WAC 246-310-050, “[a]ny person wanting to know whether an action the person is considering is subject to certificate of need requirements . . . may submit a written request to the certificate of need program requesting a *formal determination* of applicability of the certificate of need requirements to the action.” WAC 246-310-050(1) (emphasis added). On December 14, 2005, MultiCare submitted such a request for a formal determination that MultiCare Day Surgery was not subject to CN review. AR 44-83. The Department's regulations require timely resolution of such formal requests, specifically that the Department must respond within

thirty days. See WAC 246-310-050(3). In this case, the Program complied with this requirement by issuing the DNR on January 12, 2006, twenty-nine days after MultiCare's request. AR 23-26. This determination was, under the Department's regulations, "*binding* upon the department" absent a "significant change" in the nature, extent, or cost of MultiCare's facility. See WAC 246-310-050(5) (emphasis added).

3. The 20-day deadline set forth in WAC 246-10-203(1)(a)(iii) applies in this proceeding.

The APA and the Department's regulations also create formal procedures for a party to seek adjudicative review of agency action. And, again, the applicable statutes and regulations create specific, firm deadlines to seek review, thus ensuring timely resolution of issues and protecting the integrity and finality of decisions from which there is not a timely appeal.

The APA gives administrative agencies the power to "provide procedures for filing an application for an adjudicative proceeding" and to "require by rule that an application be in writing and that it be filed at a specific address, in a specified manner, *and within specified time limits.*" RCW 34.05.413(3) (emphasis added). The Department has established the following time limits for filing applications for adjudicative proceedings pursuant to RCW 34.05.413(3):

- (i) For matters under chapter 18.130 RCW, the Uniform Disciplinary Act, within twenty days of service of the initiating documents unless an extension has been granted as provided in subsection (3) of this section; and

(ii) For all other matters in which the program proposes to deny, suspend, revoke or modify a license or proposes to impose a civil fine, within twenty-eight days of receipt of the initiating documents, unless otherwise provided by statute; and

*(iii) For all other matters, within twenty days of service of the initiating documents, unless otherwise provided by statute.*

WAC 246-10-203(1)(a) (emphasis added).

The application filed by Franciscan on July 3 falls under the ambit of WAC 246-10-203(1)(a)(iii). Franciscan's application had nothing to do with the Uniform Disciplinary Act, and this is not a matter "in which the program proposes to deny, suspend, revoke or modify a license or proposes to impose a civil fine." Instead, what Franciscan challenged was the Program's decision to *grant* a DNR to MultiCare. Since neither Subsection i nor Subsection ii addresses this issue, Subsection iii, the "catchall" time limit governing "all other matters" applies.

Franciscan argues that the 28-day deadline set forth in WAC 246-310-610 applies here. Franciscan is mistaken. That regulation applies only to "[a]n applicant denied a certificate of need or a certificate holder whose certificate was suspended or revoked[.]" WAC 246-310-610(1). It gives such a "certificate applicant or holder contesting a department certificate decision" twenty-eight days from receipt of the Department's decision to file an application for an adjudicative proceeding. WAC 246-310-610(2). This is consistent with WAC 246-10-203(1)(a)(ii), which applies exactly the same, 28-day deadline to "all . . . matters in which the program proposes to deny, suspend, revoke or modify a license,"

circumstances which include denial, suspension, or revocation of a CN, a type of license.

WAC 246-10-610 simply does not apply to Franciscan's application. Franciscan is not "[a]n applicant denied a certificate of need or a certificate holder whose certificate was suspended or revoked[.]" Nor is Franciscan appealing the "deni[al,] . . . suspen[sion] or revo[cation]" of a certificate of need which it holds or has requested. To the contrary, Franciscan is a third party (not an *applicant*) contesting a DNR (not a *CN*) granted to MultiCare (not *denied* to *Franciscan*).

Franciscan also argues that the 20-day deadline does not apply because it only addresses proceedings involving "initiating documents." Franciscan is again mistaken. Franciscan's argument that WAC 246-10-203(1)(a) does not apply to all applications for adjudicative proceedings makes no sense in the context of WAC Ch. 246. WAC Ch. 246-10 "appl[ies] to adjudicative proceedings authorized to be conducted under the authority of the department of health." WAC 246-10-101. WAC 246-10-203 is the part of WAC Ch. 246-10 that addresses deadlines for filing applications for adjudicative proceedings. Nothing in WAC 246-10-203 says that it *only* applies when initiating documents are involved; rather, the broad "all other matters" language of WAC 246-10-203(1)(a)(iii) should be taken at face value and applied to "*all* other matters," including this one.

The Department effectively acknowledges that WAC 246-310-610 does not apply, arguing that this regulation should be applied by

“analogy.” This argument might have value if there were no residual deadline governing “all other matters”; clearly, in the absence of an applicable deadline, something must be applied by analogy. But here the regulations provide a residual deadline governing “all other matters,” so there is no need to apply the WAC 246-310-610 deadline “by analogy” to this case. This is not a case where there are two “analogous” deadlines between which the Court must choose, as Franciscan and the Department suggest. Rather, there is one deadline which applies: the 20-day residual deadline set forth in WAC 246-10-203(1)(a)(iii), which explicitly applies in “all other matters.”

In a similar vein, the Department’s argument that the longest deadline governs when in doubt is misplaced. If it were not clear what deadline governed, that principle may apply, but neither the Department nor Franciscan demonstrates that Franciscan’s application fits squarely into any deadline other than the residual 20-day deadline.

4. Franciscan did not file its application within twenty days.

WAC 246-10-203(1)(a)(iii) requires that an application be filed “within twenty days of *service* of the initiating documents[.]” Under the APA, “service . . . means posting in the United States mail, properly addressed, postage prepaid, or personal service. Service by mail is complete upon deposit in the United States mail.” RCW 34.05.010.

The June 6, 2006 letter, which Franciscan claims is the decision it was appealing, was served on June 6. The Attorney General’s “received”

stamp, reflecting receipt of the document on June 7, confirms this. AR 20. Accordingly, Franciscan was required to file its application by Monday, June 26.

Franciscan argues that *it* did not receive the document until Monday, June 12. Even if this were accurate, it would be irrelevant. For the reasons discussed above, the date of *receipt* is irrelevant; under the APA, only the date of *service* matters. Similarly, the date *Franciscan* obtained a copy of the letter is irrelevant; the date it was served on *MultiCare*, the applicant and addressee of the letter, is what counts.

Even if the date the document was served on Franciscan were actually relevant, however, Franciscan concedes that it received the letter by Monday, June 12. This means the letter was mailed by the Department no later than the previous business day, Friday, June 9, making the deadline to file no later than Thursday, June 29.

Under any possible scenario, Franciscan's July 3 application was filed more than twenty days after service of the Department's June 6 letter. Accordingly, even if the June 6 letter *were* the decision being appealed, Franciscan's application was not timely filed.

5. Because there was no timely application, the HLJ did not have jurisdiction to review the DNR.

Because Franciscan did not file a timely application for adjudicative review, the HLJ had no jurisdiction to conduct an adjudicative proceeding or to reverse the Program's DNR. See RCW 34.05.440(1) ("Failure of a party to file an application for an adjudicative

proceeding within the time limit or limits established by statute or agency rule constitutes a default and results in the loss of that party's right to an adjudicative proceeding[.]"); Rust v. W. Wash. State Coll., 11 Wn. App. 410, 415, 523 P.2d 204 (1974) (deadline to seek administrative review "is mandatory and jurisdictional"). Because the HLJ lacked jurisdiction, her order reversing the DNR was invalid. See Erection Co. v. Dep't of Labor and Indus., 121 Wn.2d 513, 519, 852 P.2d 288 (1993) (holding that agency lost jurisdiction when it failed to meet "mandatory, jurisdictional" 30-day deadline imposed by statute, "and the Department's . . . order was invalid because of this lack of jurisdiction"). The HLJ's order reversing the Program's DNR was therefore invalid, and the Program's DNR should be reinstated. The Court need not reach the other issues raised in this appeal.

**B. If The Agency Action Being Appealed Was The January 12, 2006 DNR, Franciscan's Application Was Untimely (Regardless Of Whether the Deadline Was Twenty Or Twenty-Eight Days).**

If the Court rules that the deadline for Franciscan to appeal the Department's decision was twenty-eight days, not twenty days, the Court must then determine whether the decision being appealed was the January 12, 2006 DNR (making Franciscan's July 3 application untimely) or the June 6, 2006 letter regarding use of the facility by additional physicians (making Franciscan's application timely).

The language of the Program's January 12, 2006 DNR is unambiguous: "[T]he Certificate of Need Program concludes that the

establishment of the ASC associated with the MultiCare Medical Associates practice does not meet the definition of an ASC under the Certificate of Need provisions of Washington Administrative Code (WAC) 246-310-010. Therefore, the proposed ASC is not subject to Certificate of Need review.” AR 24. As discussed above, this was a formal determination of non-reviewability, pursuant to WAC 246-310-050(3), in response to MultiCare’s formal request for a determination of non-reviewability, pursuant to WAC 246-310-050(1), which was “binding” on the Department pursuant to WAC 246-310-050(5). Accordingly, the Department’s internal documents identify the January 12, 2006 DNR as the agency’s “Final Action.” AR 161.

Franciscan appears to make three arguments why it was not required to appeal the January 12, 2006 DNR if it wished to challenge that decision. First, Franciscan argues that it did not learn of the January 12, 2006 DNR until a week after it was issued. Second, Franciscan argues that as a result of informal communications with the Department, Franciscan concluded that it was not required to formally appeal the January 12, 2006 DNR. Third, Franciscan argues that, in any event, the June 6, 2006 letter was the agency’s “final” action, not the January 12, 2006, DNR.

With respect to Franciscan’s first argument, the exact date Franciscan learned of the January 12, 2006 DNR has no impact. Franciscan itself states that it learned of the DNR on approximately January 19, 2006, one week after it was issued. AR 3. Therefore, even if

the date Franciscan learned of the Department's decision, rather than the date the decision was issued, is what starts the appellate clock, the deadline to appeal would be, at the very latest, February 16, 2006 (twenty-eight days after January 19). Franciscan's July 3, 2006 application for an adjudicative proceeding was still filed nearly five months late.

Franciscan's second argument, that the post-DNR letters and conversations about the decision were somehow a substitute for filing a formal application for an adjudicative proceeding, or that they somehow extended the time to do so, misunderstands the fundamental nature of this deadline. This is not a flexible deadline that may be extended or waived; rather, it is a jurisdictional deadline, a limitation on the very authority of the Department to conduct an adjudicative proceeding. Given the very specific requirements of the APA and the Department's regulations governing formal determinations of non-reviewability and timely adjudicative review, the Department cannot simply substitute informal discussions for formal processes. In addition to violating the applicable statutes and regulations, it would be grossly unfair to place MultiCare, the recipient of the DNR, in a five-month limbo while the Department continues to think about a "final" and "binding" decision it already issued, without any firm deadline as to *when* MultiCare can confidently rely upon the already-issued DNR.

Moreover, the statements attributed to the Department by Franciscan regarding the lack of need for a formal appeal are disputed by the Department itself. For example, Franciscan claims that Bart Eggen,

the Manager of the Department of Health Office of Certification and Technical Support, to whom CN Program Manager Janis Sigman reports, told Franciscan's consultant, Jody Carona, "that any DNR issued by the Program is not 'cast in concrete' and can be pulled if circumstances change." FHS Br. at 10. Mr. Eggen disputes this, and testified by declaration as follows: "I do not recall telling Ms. Carona that the Program could 'pull' the DOR at any time. In fact, I believe that the Program cannot change a DOR, and that *MultiCare had the right to rely on the DOR.*" AR 156-57 (emphasis added). Mr. Eggen also explained that the June 6 letter was simply a warning to MultiCare that if it allowed part-time employed physicians to use the ASC, it would no longer have a DNR. AR 157.

The key point, however, is that regardless of what may or may not have been discussed between Franciscan and the Department following the January 12 DNR, none of these discussions could have changed the mandatory, jurisdictional deadline to commence an appeal of that decision.

The premise underlying Franciscan's argument is that the Department was not bound to follow the formal review procedures set forth in the APA, but instead could engage in an informal discussion with Franciscan and MultiCare, through meetings, telephone calls, letters, and e-mails, in order to reconsider its decision that MultiCare's facility was not subject to CN review. This premise is antithetical to the purpose of the 1988 APA—consistency and clarity—and contrary to its express

requirements. See RCW 34.05.440(1) (“Failure of a party to file an application for an adjudicative proceeding within the time limit or limits established by statute or agency rule *constitutes a default* and results in the loss of that party’s right to an adjudicative proceeding[.]”) (emphasis added). Franciscan cites no authority for its argument that the Department can ignore the requirements of the APA and the Department’s own regulations, and instead continue to informally “review” the DNR *after* it is issued.

Franciscan’s third argument, that the June 6 letter is the “final” decision on MultiCare’s request for a determination of non-reviewability, cannot be supported given what Ms. Sigman actually wrote in that letter. Ms. Sigman begins by noting that a DNR was issued to MultiCare “[o]n January 12, 2006.” AR 20. Ms. Sigman then observes that this decision was based on MultiCare’s representation that use of the facility would be limited to the fifty-three physicians of the MultiCare Medical Associates private practice. AR 20. This observation is consistent with the language of the Closed ASC Exemption, which requires that “the privilege of using the facility is not extended to physicians or dentists outside the individual or group practice.” WAC 246-310-010(5). Ms. Sigman then goes on to explain that if physicians other than the MultiCare Medical Associates physicians were to use the ASC, it would no longer be exempt. AR 21. Because she understood that MultiCare was now opening up the ASC to additional physicians, “the January 12, 2006, DOR is not applicable to the project” any longer. AR 21.

In response to Ms. Sigman's June 6 letter, MultiCare's counsel responded, on June 13, that use of the ASC would be limited to the MultiCare Medical Associates physicians. AR 113-14. Thus, Ms. Sigman's concerns that the MultiCare would violate the terms of the January 12 DNR were resolved.

Franciscan disputes nothing, and appealed from nothing, in Ms. Sigman's June 6 letter. In fact, Ms. Sigman stated in her June 6 letter exactly what Franciscan asked her to state: that MultiCare Day Surgery would no longer fall under the Closed ASC Exemption if surgeries would be performed there by physicians employed by MultiCare part-time.

Ms. Sigman's June 6 letter was consistent with WAC 246-310-050(5), which states that a formal determination of non-reviewability, such as the January 12 DNR, is only binding so long as the "nature, extent, or cost of the action does not significantly change." If the "nature" of MultiCare Day Surgery were to change—i.e., if it would be opened up to additional surgeons beyond the full-time MultiCare Medical Associates physicians in whose office the facility existed—the Program's January 12 DNR may no longer be binding. However, this would have no effect on the validity of the January 12 DNR for the nature of MultiCare's facility as it existed at that time. And, because the nature of the facility did *not* change, as confirmed by MultiCare's June 13 response letter, the January 12 DNR has never been invalidated. Therefore, Franciscan's contentions that "the Certificate of Need Program's decision to grant MultiCare a DNR was still under consideration until June 2006," FHS Br. at 23, and

that “[t]he Program clearly reconsidered its January 12, 2006 determination based on information it received from Franciscan,” FHS Br. at 25, are mistaken. The Department never reconsidered the basis for the January 12 DNR; it only considered whether circumstances had changed such that the January 12 DNR was no longer binding.

The January 12 DNR was never withdrawn. It was never reconsidered. The only thing that happened was that Franciscan told the Department that MultiCare Medical Associates was going to violate the terms of the DNR by employing physicians outside the practice “part-time” so that they could use the ASC; the Department, in turn, told MultiCare that if it did so, the DNR would no longer reply; and MultiCare, in turn, ultimately informed the Department that use of the ASC would be limited to the full-time physicians of the MultiCare Medical Associates practice.

The idea that Franciscan was appealing from Ms. Sigman’s June 6 letter, rather than the January 12 DNR, is pure fiction. Franciscan apparently made a strategic decision to not formally appeal the January 12 DNR. Perhaps Franciscan thought it had a better chance of invalidating the DNR through informal “back-channels” (i.e., Ms. Carona’s meetings, telephone calls, letters, and e-mails with Ms. Sigman and Mr. Eggen) than it did through a formal adjudicative review. When Franciscan failed to invalidate the January 12 DNR through these informal means, Franciscan then latched on the June 6 letter and pretended that *this* was the agency decision it objected to.

Franciscan's July 3 appeal of the Program's January 12 DNR was untimely. Accordingly, the HLJ did not have authority to conduct an adjudicative proceeding, and her Final Order is invalid. If the Court reinstates the Program's DNR on this ground, it need not reach the final issue in this appeal—whether the Program correctly interpreted WAC 246-310-010(5) to mean that facilities such as MultiCare Day Surgery are not subject to CN review.

**C. If The Scope Of The Closed ASC Exemption Is Derived From The Plain Language Of The Regulation, MultiCare Day Surgery Is Exempt From CN Review.**

If the Court determines that Franciscan's application for an adjudicative proceeding was timely, it must then determine whether MultiCare Day Surgery is exempt from CN review under the Closed ASC Exemption. The interpretation of a regulation is an issue of law reviewed *de novo*. Cobra Roofing Serv., 122 Wn. App. at 409.

On its face, WAC 246-310-010(5) requires that an ambulatory surgery center must satisfy two requirements to be exempt from CN review: (1) the facility must be in the offices of private physicians, and (2) use of the facility must be limited to those physicians. See WAC 246-310-010(5). No additional requirements are stated in the regulation. "If an administrative rule or regulation is clear on its face, its meaning is to be derived from the *plain language* of the provision *alone*." Dep't of Licensing v. Cannon, 147 Wn.2d 41, 56, 50 P.3d 627 (2002) (emphasis added).

MultiCare Day Surgery satisfies the Closed ASC Exemption if the regulation's meaning is derived from its plain language. First, the facility is in the offices of private physicians, specifically the MultiCare Medical Associates practice. AR 23. Dr. Bisher Abdulla and the other fifty-two physicians who make up the MultiCare Medical Associates practice are specifically identified in the record, and in the Program's January 12, 2006 DNR, at AR 26. Second, use of the facility will be limited to the MultiCare Medical Associates physicians. AR 23, 114. Therefore, if the Court interprets WAC 246-310-010(5) according to its plain language alone, the Court should conclude that MultiCare Day Surgery is exempt from CN review, and the Program's DNR should be reinstated.

Although the Supreme Court has explicitly stated that a court must "*not add to . . . the clear language of a . . . regulation,*" Cannon, 147 Wn.2d at 57, Franciscan now urges the Court to add two limitations to the Closed ASC Exemption which appear nowhere in the regulation. First, Franciscan asks the Court to narrow the scope of the Closed ASC Exemption to exclude facilities built by hospitals. Second, Franciscan asks the Court to interpret the phrase "group practice" to mean not what the plain language suggests (i.e., a practice of more than one physician) and to instead mean "group practice" as defined for purposes of the federal, anti-kickback "Stark Law." Franciscan effectively asks the Court to rewrite the regulation as follows:

*"[A] facility [built by an entity that does not own a hospital, and] in the offices of private physicians or dentists, whether [(1) an individual physician or dentist, or*

*(2) a “group practice” of physicians or dentists as defined under 42 C.F.R. 411.352(a), but not (3) a private practice consisting of more than one physician or dentist which would not be classified as a “group practice” under 42 C.F.R. 411.352(a)], if the privilege of using the facility is not extended to physicians or dentists outside the individual or [42 C.F.R. 411.352(a)] group practice.”*

WAC 246-310-010(5) (emphasis on Franciscan’s proposed changes).

The 1996 rule change cited by Franciscan in support of its “non-hospital” argument actually demonstrates that hospitals *can* rely on the Closed ASC Exemption, just like any other type of provider can rely upon the exemption. As Franciscan notes, prior to the rule change, ASCs built by hospitals, and licensed as part of the hospital, were *never* subject to CN review. In other words, there was a “hospital” exemption when it came to CN review of ambulatory surgical facilities. That changed in 1996, and hospitals are now subject to the *same* rule as other entities.

However, just as hospital-based ASCs are subject to CN review like other ASCs are subject to CN review, hospitals are entitled to rely on the Closed ASC Exemption like other providers are entitled to rely on the Closed ASC Exemption. Nothing in the Department’s decision to apply the *same* rule to hospitals for purposes of CN review suggests that it intended to apply a *different* rule to hospitals for purposes of the Closed ASC Exemption to CN review. If the Department had wished to do so, it easily could have added language to the regulation which would accomplish this. It did not.

If MultiCare Health System wished to build as ASC that would be open to all physicians with privileges to practice at Tacoma General, for

example, it is undisputed that this facility would now be subject to CN review. However, that is not the case here. MultiCare Medical Associates, a private practice of fifty-three specific physicians, wishes to establish a ASC. Just because MultiCare Medical Associates is part of MultiCare Health System, which also owns Tacoma General and other hospitals, does not prevent MultiCare Medical Associates from relying on the Closed ASC Exemption. It has the same ability to do so as any private physician practice wishing to establish an ASC in its own offices.

With respect to the “Stark Law” definition of “group practice” which Franciscan seeks to incorporate into WAC 246-310-010(5), the federal government has itself stated that this definition of “group practice” is designed for a very specific purpose—regulating physician referrals—and is not intended to apply even to other Medicare regulations:

*We wish to also point out that the definition of a group practice in section 1877(h)(4) is particular to the referral rules. That is, it was designed to allow physicians in specific kinds of groups to continue to refer patients for designated health services under certain circumstances. Therefore, the definition may have little or no bearing on which physicians qualify as a group practice for purposes of other Medicare or Medicaid provisions.*

Medicare and Medicaid Programs; Physicians’ Referrals to Health Care Entities With Which They Have Financial Relationships, Comments, 63 Fed. Reg. 1687 (rule proposed Jan. 9, 1998; to be codified at 42 C.F.R. Parts 411, 424, 435, and 455) (emphasis added).

Franciscan cites deposition testimony of Ms. Sigman, suggesting that the Program relies on the Stark Law definition of “group practice,”

but Ms. Sigman never testified to what she actually understands this to mean, and even expressed some uncertainty on this point. AR 657 (“whether it strays from Stark law or not, I can’t tell you”). This is perfectly understandable, given that even legal scholars experience extreme frustration in trying to understand and apply this particular federal statute. See, e.g., Alice G. Gosfield, *The New Playing Field*, 41 St. Louis U. L.J. 869, 883 (1997) (“Stark presents to lawyers the profound conundrum of providing uncertain advice where the basic terms and provisions of the statute remain essentially unfathomable[.]”).

The Court would be ill-advised to adopt Franciscan’s suggestion that the phrase “group practice” in WAC 246-310-010(5) be interpreted to mean “group practice as defined in 42 C.F.R. 411.352(a),” especially given the federal government’s own admonition that this definition is meant only for the very narrow purpose of regulating physician referrals, and should not necessarily be relied upon in any other context. Such an interpretation would also, as practical matter, be very difficult to apply, given that even the CN Program Manager concedes that she is not quite certain how this interpretation would impact the regulation. Most importantly, such an interpretation would be inconsistent with the obvious plain-language meaning of the phrase “group practice.”

The Closed ASC Exemption applies to “a facility in the offices of private physicians or dentists, *whether for individual or group practice*[.]” WAC 246-310-010(5) (emphasis added). This phrase obviously was included to clarify that the exemption applies to both (1) practices made

up of a single physician (an “individual practice”) and (2) practices made up of multiple physicians (a “group practice”). It cannot reasonably be interpreted to mean that the exemption applies to the practices of single physicians and practices made up of multiple physicians if they would be classified as “group practices” under 42 C.F.R. 411.352(a), but not to apply to practices made up of multiple physicians if they would not be classified as “group practices” under 42 C.F.R. 411.352(a).

Consistent with the principles of proper regulatory interpretation, the Court should interpret the Closed ASC Exemption based on “the *plain language* of the provision *alone*.” Cannon, 147 Wn.2d at 56 (emphasis added). MultiCare Day Surgery falls within the exemption if it is properly interpreted.

The plain-language interpretation of WAC 246-310-010(5) is also consistent with how the Department has applied the regulation in the past. In its opening brief, MultiCare identified two facilities—Virginia Mason’s ASC in Federal Way and Kennewick General Hospital’s ASC in Kennewick—which are virtually identical to MultiCare’s facility in all relevant respects. Both the Virginia Mason ASC and the Kennewick ASC are considered by the Department to be exempt from CN review, under the Closed ASC Exemption.

The Department’s DNR for the Kennewick ASC is particularly illustrative. Just as MultiCare Day Surgery would be limited to the physicians of MultiCare Medical Associates, KGH Medical Mall would be limited to the physicians of KGH Northwest Practice Management. AR

188. Just as other physicians with privileges to practice at Tacoma General would not have access to MultiCare Day Surgery, other physicians with privileges to practice at Kennewick General Hospital would not have access to KGH Medical Mall. Id. Just as MultiCare Medical Associates entered into an agreement with MultiCare Health System for management of MultiCare Day Surgery, KGH Northwest Practice Management entered into an agreement with Kennewick General Hospital for the management of KGH Medical Mall. And, finally, just as the Department issued a DNR to MultiCare Health System, but warned that MultiCare Day Surgery would lose its exemption “should MultiCare Medical Associates later decide to extend the privilege of using the ASC to physicians not part of the group practice[.]” AR 24, the Department issued a DNR to Kennewick General Hospital, but warned that KGH Medical Mall would lose its exemption “should the KGH Northwest Practice Management later decide to extend the privilege of utilizing the facility to physicians who are not members of the practice[.]” AR 189.

The HLJ’s interpretation of the Closed ASC Exemption is a 180-degree reversal of the Department’s historic interpretation of this regulation, and a clear break with the Department’s past practice of applying the exemption. There is no difference between MultiCare’s facility and Kennewick’s facility that would explain different results for the two applicants. Treating applicants differently without any basis for doing so is the very definition of arbitrary and capricious decision-making.

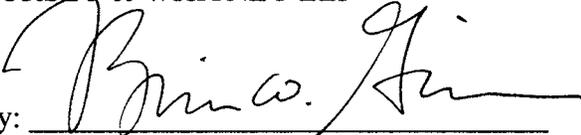
Based on the plain-language meaning of WAC 246-310-010(5), which is consistent with the Department's historic interpretation of the regulation, the Court should conclude that MultiCare Day Surgery is exempt from CN review.

### III. CONCLUSION

The HLJ's Final Order was procedurally invalid, because the HLJ had no jurisdiction to issue it, and substantively wrong, because it was based on a misinterpretation of the regulation at issue. Allowing the HLJ's order to stand would violate fundamental principles of limited agency jurisdiction. It also would be inconsistent with the applicable standards for regulatory interpretation and proper agency decision-making. Accordingly, MultiCare respectfully requests that the Court reverse the HLJ's Final Order and reinstate the Program's DNR.

Respectfully submitted this 3rd day of June 2008.

DORSEY & WHITNEY LLP

By: 

Peter S. Ehrlichman, WSBA #6591  
Brian W. Grimm, WSBA #29619

U.S. Bank Centre  
1420 Fifth Avenue, Suite 3400  
Seattle, WA 98101

Attorneys for Petitioner/Appellant,  
MultiCare Health System

**PROOF OF SERVICE**

Today I caused the foregoing MULTICARE'S REPLY BRIEF to  
be served on the following persons by U.S. Mail:

Richard A. McCartan  
Geoffrey W. Hymans  
Assistant Attorneys General  
OFFICE OF THE ATTORNEY  
GENERAL  
7141 Cleanwater Drive SW  
Olympia, WA 98504  
Counsel for Department of Health and  
Certificate of Need Program

Donald W. Black  
Jeffrey D. Dunbar  
E. Ross Farr  
OGDEN MURPHY WALLACE,  
P.L.L.C.  
1601 Fifth Avenue, Suite 2100  
Seattle, WA 98101  
Counsel for Franciscan Health System

DATED this 3rd day of June 2008.

  
\_\_\_\_\_  
Brian W. Grimm