

No. 47885-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PROVIDENCE PHYSICIAN SERVICES CO.,

Petitioner,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH
and ROCKWOOD HEALTH SYSTEM D/B/A VALLEY
HOSPITAL,

Respondents.

REPLY BRIEF OF PROVIDENCE PHYSICIAN
SERVICES CO.

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I. INTRODUCTION

There can be no serious dispute that the Department has adopted a new CON rule. Prior to 2013, a physician group owned by a hospital or health system did *not* need a CON for an operating room in its offices used exclusively by its members. Now it *does* need one. The Department did not follow any rulemaking procedures before adopting this new licensing requirement. Moreover, even if this *were* merely a change of interpretation of an existing rule, rather than the adoption of a new rule, the Department's new interpretation of the Exclusive Use Exemption is incorrect; as a matter of law, the Department's historical interpretation was the correct one.¹

II. SCOPE OF REPLY BRIEF

As explained in PPSC's opening brief, the Reviewing Officer determined that PPSC could not rely upon the Exclusive Use Exemption because (1) the operating rooms that PPSC proposed to use on an exclusive basis would be located in leased space in a larger medical complex, and (2) PPSC is owned by Providence. *See* Opening Brief of Providence Physician Services Co. ("Op. Br.") at 12-14. PPSC's arguments why the first ground constituted error have been provided. *See*

¹ PPSC will use the same defined terms in this reply brief that it used in its opening brief.

Op. Br. at 17-24 and 30-32. Neither the Department nor Rockwood has responded to PPSC's arguments or attempted to defend the Reviewing Officer's decision in this respect. PPSC accordingly limits this reply brief to the second ground identified by the Reviewing Officer.

III. ARGUMENT

A. The Department's approach was consistent from 1999 to 2013, at which point the Department changed its position.

As documented by the four formal applicability determinations issued by the Department between 1999 and 2013, for at least fifteen years a physician group owned by a hospital or health system was not required to obtain a CON for operating rooms in its offices limited in use to its members. In other words, physician groups owned by hospitals or health systems could rely upon the Exclusive Use Exemption to the same extent that physician groups owned by their members could do so. The Department confirmed this with respect to a physician group owned by Virginia Mason Medical Center; a physician group owned by Kennewick General Hospital; PPSC itself; and Port Townsend Surgical Associates, a physician group being acquired by Jefferson Healthcare. AR 82-83, 90-103, 176-79, and 315-18; *see also* Op. Br. at 6-8 (discussing applicability determinations in detail).

There is no way to distinguish, substantively, PPSC from the Virginia Mason, Kennewick General, and Jefferson Healthcare-owned

physician practices, for purposes of this analysis. And there are *no* contrary examples, i.e., of the Department requiring, prior to 2013, a CON because the physician group seeking to rely upon the Exclusive Use Exemption was owned by a hospital or health system.

The Department was consistent for at least fifteen years. The Department and Rockwood attempt to obscure this consistency by discussing examples of *hospitals*—i.e., *not* physician groups—seeking to rely upon the Exclusive Use Exemption. See Respondent Washington State Department of Health’s Brief (“Dept. Br.”) at 11-14; Brief of Respondent, Rockwood Health System, d/b/a Valley Hospital (“Rockwood Br.”) at 9-15. PPSC anticipated this tactic in its opening brief. See Op. Br. at 28, n.6. None of the examples cited by the Department or Rockwood involve a physician group owned by a hospital or health system, such as PPSC, seeking to rely upon the Exclusive Use Exemption; instead, each involved a hospital seeking to rely upon the exemption.

The principal example relied upon by Respondents is Health Law Judge Zimmie Caner’s 2006 decision regarding MultiCare Health System’s request to rely upon the Exclusive Use Exemption. As a preliminary matter, this Court reversed and vacated HLJ Caner’s decision because she lacked jurisdiction to issue it. See *MultiCare Health Sys. v.*

Dep't of Health, 2008 WL 4868881, at *6 (Wash. App. Nov. 12, 2008). As a result of the Court's decision, it is as if HLJ Caner's decision was never made, because she did not have jurisdiction to make it. *See Chai v. Kong*, 122 Wn. App. 247, 254, 93 P.3d 936 (2004) ("Where a court lacks jurisdiction over the parties or the subject matter, or lacks the inherent power to make or enter the particular order, its judgment is void."); *see also In Re Marriage of Leslie*, 112 Wn.2d 612, 618, 772 P.2d 1013 (1989) ("A vacated judgment has no effect. The rights of the parties are left as though the judgment has never been entered."). Therefore, it is strange that Respondents have based their argument to this Court so heavily on HLJ Caner's order, in light of the Court's having formed "a definite and firm conviction that a mistake ha[d] been made" by HLJ Caner and having vacating her order for lack of jurisdiction. *MultiCare Health Sys.*, at *6.

Moreover, even the *reasoning* of HLJ Caner's order fails to support Respondents' argument. MultiCare *itself* sought to rely upon the Exclusive Use Exemption, to operate a surgery center as an *outpatient department of Tacoma General Hospital*, and to permit MultiCare's employed physicians to use the facility. HLJ Caner determined that the Exclusive Use Exemption cannot be relied upon by "hospitals or other non-physician corporations"; she did not rule that the Exclusive Use

Exemption cannot be relied upon by a physician practice like PPSC. AR 627.

The other two examples cited by Respondents, the Department's 2008 determination that PeaceHealth could not rely upon the Exclusive Use Exemption and the Department's 2009 determination that Seattle Children's could not rely upon the Exclusive Use Exemption, similarly involved hospitals themselves attempting to rely upon the Exclusive Use Exemption. PeaceHealth, a health system, sought to own, manage, and bill for all services provided in its facility. AR 157. Seattle Children's proposed to operate its facility as a department of its hospital. Rockwood Br., Appendix. The hospital examples cited by Respondents are consistent with the Department's earlier elimination, pursuant to rulemaking, of an exemption for ambulatory surgical facilities operated by hospitals. *See* Dept. Br. at 3.

The MultiCare, PeaceHealth, and Seattle Children's examples simply are not analogous to PPSC's request to rely upon the Exclusive Use Exemption. The analogous situation would be if *Providence* sought to rely upon the Exclusive Use Exemption to operate a surgery center as an outpatient department of Sacred Heart Medical Center, which would be available to all physicians employed by Providence. This was not the proposal before the Department. Instead, *PPSC*, a physician practice,

sought to rely upon the exemption. PPSC is a separate legal entity from Providence, and the operating rooms would be used exclusively by PPSC's own twenty-seven surgeons. AR 316.

* * *

Respondents are incorrect that the Department was inconsistent in its application of the Exclusive Use Exemption prior to 2013. Every time a physician practice owned by a hospital asked the Department whether the practice's ownership was relevant to its reliance upon the Exclusive Use Exemption, the Department determined that it was not, and that the physician practice owned by a hospital could rely upon the Exclusive Use Exemption to the same extent that a physician practice owned by its members could do so. The Department was consistent until 2013, at which point it decided that a CON should be required for such facilities, and began requiring CON review without going through any rulemaking process.

B. The Department cannot adopt new licensing requirements under the guise of "reinterpreting" long-established rules.

An agency's rules "are invalid unless adopted in compliance with the APA." *Hillis v. State, Dep't of Ecology*, 131 Wn.2d 373, 398, 932 P.2d 139 (1997) (citing *Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 649, 835 P.2d 1030 (1992)). The Court "shall declare the

rule invalid” if “the rule was adopted without compliance with statutory rule-making procedures.” RCW 34.05.570(2)(c). The Department’s New Requirements plainly constitute “rules” and “significant legislative rules.” See RCW 34.05.010(16)(d) (“rules”); RCW 34.05.328(5)(c)(iii) (“significant legislative rules”); see also Op. Br. at 17-21 (discussing in detail). An activity that previously did not require a CON now does require a CON.

The Department, relying upon *Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998), argues that the New Requirements merely constitute a change of interpretation of an existing rule, not a new rule requiring rulemaking. See Dept. Br. at 17-18. The Department’s reliance upon this case is misplaced.

As a preliminary matter, the portion of the *Theodoratus* opinion relied upon the Department merely addressed, in summary fashion, an argument by amici curiae that the agency’s change in policy required APA rulemaking. See Dept. Br. at 18 (citing *Theodoratus*, 135 Wn.2d at 600). This commentary is obiter dicta and not precedent. See *Bldg. Indus. Ass’n of Wash. v. McCarthy*, 152 Wn. App. 720, 749, 218 P.3d 196 (2009) (holding that arguments raised only by amici curiae need not be considered). Substantively, there also are at least two key differences between *Theodoratus* and this case.

First, Ecology's action in *Theodoratus* did *not* change the qualifications for the benefit at issue. The appellant was entitled to a water certificate under both the old and the new policies; the change only affected the scope, i.e., the amount of water to which the appellant could claim a vested right. Here, in contrast, the question is whether PPSC can or cannot use operating rooms without a CON. Under the Department's long-established policy, it could; under its new directive, it cannot. This plainly changes the qualifications or standards for the issuance of a license and is therefore a rule. *See* RCW 34.05.010(16)(d).

Second, there was no ambiguity in the statute at issue in *Theodoratus*. The court explained at length that the old interpretation was plainly wrong. *See Theodoratus*, 135 Wn.2d at 590-97. Thus, correcting an allegedly erroneous interpretation, as allowed in *Theodoratus*, involves much more than an agency simply changing its mind about how a regulation should be read. It requires showing that the prior interpretation was clearly wrong. This analysis contrasts sharply with what the Department attempts to characterize as correcting an erroneous interpretation here. There is no plain language in WAC Chapter 246-310 applying the Department's new interpretation. Nor has the Department cited a single case supporting its new interpretation. The only precedents regarding reliance by a physician group owned by a hospital or health

system on the Exclusive Use Exemption, cited by any party, are the Department's four applicability determinations that such physician groups *can* rely upon the Exclusive Use Exemption.

Moreover, other cases decided after *Theodoratus* repeatedly have held that an agency cannot simply change interpretations at its whim, and that courts should look unfavorably upon an agency's sudden change in an established interpretation. *See, e.g., Silverstreak, Inc. v. Wash. State Dep't of Labor and Indus.*, 159 Wn.2d 868, 891, 154 P.3d 891 (2007) (Washington courts "will not sanction a government agency's arbitrary decision to change its interpretation of rules").

C. PPSC properly challenged the Department's failure to follow statutory rulemaking procedures before adopting the New Requirements.

The Department argues that the Court should not consider PPSC's argument that the Department's New Requirements constitute rules because PPSC did not make this argument in the adjudicative proceeding. *See* Dept. Br. at 17. As a preliminary matter, the Department is wrong as a matter of law that the validity of rules must be challenged in an adjudicative proceeding before it may be challenged in a judicial review proceeding. More directly, however, the Department's argument is inapplicable in the context of this case because the Department had not yet adopted the New Requirements at the time of the adjudicative proceeding;

the New Requirements were adopted by the Department in its order arising out of the adjudicative proceeding.

In an judicial review proceeding, a court may “enter a declaratory judgment order,” among other types of relief. RCW 34.05.574(1). The APA provides that “[a] rule may be reviewed by petition for declaratory judgment filed pursuant to this subsection *or in the context of any other review proceeding under this section.*” RCW 34.05.570(2)(a) (emphasis added). It further provides that “[t]he declaratory judgment order may be entered *whether or not* the petitioner has first requested the agency to pass upon the validity of the rule in question.” RCW 34.05.570(2)(b)(i) (emphasis added). Therefore, a party challenging the validity of a rule need not raise the rule’s validity in an adjudicative proceeding before doing so in court. *See Simpson Tacoma*, 119 Wn.2d at 647 (holding that plaintiffs “were not required to first raise” their challenge to validity of Ecology rules “in administrative proceedings ... prior to seeking relief in superior court.”).

Irrespective of the legal issue, the Department’s argument is inapplicable in the context of this case. At the time of the adjudicative proceeding, the Department still did not require a physician group owned by a hospital or health system to obtain a CON for operating rooms in its offices used exclusively by the members of the group. Indeed, the

adjudicative proceeding was commenced *by Rockwood*, to challenge the Department's determination that PPSC *could* rely upon the Exclusive Use Exemption. Even after the adjudicative proceeding was commenced by Rockwood, on April 22, 2013, the Department continued to take the position that physician groups owned by hospitals or health systems could rely upon the Exclusive Use Exemption. On July 23, 2013, the Department issued the applicability determination to Port Townsend Surgical Associates to this effect, just as it had done with respect to PPSC. AR 176-79.

The Department adopted the New Requirements through its order arising out of the adjudicative proceeding. PPSC obviously could not have challenged the validity of the New Requirements prior to the Department adopting them.

As soon as the Department issued its Final Order in the adjudicative proceeding, adopting the New Requirements, PPSC challenged them in Court on the ground that the Department failed to satisfy statutory rulemaking requirements. CP 1-17 (Petition for Judicial Review), ¶26 (asserting that the New Requirements constitute "rules" and "significant legislative rules," and that "[t]he Department did not follow any of the required rulemaking procedures set forth in RCW 34.05 before adopting the New Rules"); ¶31(g) (asserting that "[t]he New Rules are

invalid”) and ¶32(c) (requesting that the Court “[i]ssue a declaratory judgment that the New Rules are invalid”). The Superior Court determined that the New Requirements did not constitute rulemaking. CP 74. However, this Court does not review the Superior Court’s order; it sits in the same position as the Superior Court and reviews the agency actions directly. *See Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000).

As a matter of law, the validity of agency rules may be challenged directly in court, without first seeking review by the agency. Moreover, PPSC could not have challenged the Department’s adoption of the New Requirements as invalid rulemaking during the adjudicative proceeding in this matter, because they had not yet been adopted. PPSC has properly challenged the validity of the New Requirements in this judicial review proceeding.

D. Whether PPSC described itself as a “group” or “other” practice on the Department’s application form is irrelevant to whether PPSC’s physicians are, as a factual matter, private physicians.

The Department appears to argue that the Exclusive Use Exemption requires that a physician group be an “individual practice” or a “group practice,” but does not explain what physician practices it believes would be excluded based on this requirement. *See Dept. Br.* at 10. The

Department's entire argument instead seems to be based on the fact that PPSC checked the "other" box, rather than the "group practice" box, on the Department's application form.

As a preliminary matter, it is clear from the language of the regulation that the phrase "whether for individual or group practice" merely serves to clarify that "private physicians" includes physicians who practice on their own *and* physicians who practice with others. There is no support for the proposition that this provision somehow *limits* the "private physicians" that may rely upon the Exclusive Use Exemption.

Moreover, PPSC explained below why it checked the "other" box rather than the "group practice" box on the Department's application form: This was the only option that allowed PPSC to explain its corporate structure, which it did. AR 321 (*Question 4*: "If you checked 'Other' from question 3, please describe the organizational structure of clinical practice." *Response*: "The clinical practice is owned by Providence Physician Services Co. All physicians that will be performing services at the ASC under the exemption request will be Providence Physician Services Co. employed physicians. Providence Physician Services Co. is a subsidiary of Providence Health & Services – Washington.").

PPSC is what it is, regardless of which box it checked on the application form. The salient question is not which box PPSC checked. It

is whether PPSC's physicians actually are "private physicians" for purposes of the Exclusive Use Exemption; i.e., whether this phrase includes those physicians in practices owned by hospitals or health systems.

E. The Department's new interpretation is entitled to no deference.

The Department and Rockwood repeatedly assert that the Court should "defer" to the Department's new interpretation of the Exclusive Use Exemption to exclude physician groups owned by hospitals or health systems. *See* Dept. Br. at 7, 11, 16; Rockwood Br. at 5-6. But they fail to explain why the Court should defer to the Department's new interpretation of the regulation, rather than the Department's 15-year history of interpreting the Exclusive Use Exemption to *include* physician groups owned by hospitals or health systems. In light of the Department's longstanding contrary interpretation of the Exclusive Use Exemption, prior to its sudden change of position in 2013, the Court should give no deference to the Department's new interpretation. *See Dot Foods, Inc. v. Dep't of Revenue*, 166 Wn.2d 912, 921, 215 P.3d 185 (2009) ("The Department's argument for deference is a difficult one to accept, considering the Department's history interpreting the exemption.").

Additionally, “where a statute has been left unchanged by the legislature for a significant period of time, the more appropriate method to change the interpretation or application of a statute is by amendment or revision of the statute, rather than a new agency interpretation.” *Dot Foods*, 166 Wn.2d at 921; *see also Grays Harbor Energy, LLC v. Grays Harbor County*, 175 Wn. App. 578, 584, 307 P.3d 754 (2013) (“[w]hen interpreting a regulation,” court follows “the same rules” it uses “to interpret a statute.”). The same is true here. If the Legislature believed that the Department’s interpretation of the Exclusive Use Exemption created too broad an exception to the CON laws, it has had at least since 1999 to correct this, but has chosen not to do so.

If the Court determines that the New Requirements do not constitute rulemaking, the Court should determine the correct interpretation of the Exclusive Use Exemption as a matter of law, not based on an unwarranted deference to the Department’s new interpretation at the expense of its longstanding interpretation.

F. The Exclusive Use Exemption applies to all physician practices, not just those owned by their members.

As explained in detail in PPSC’s opening brief, applying the principles of regulatory interpretation the Court should conclude that the Exclusive Use Exemption applies both to physician groups owned by their

members and to physician groups owned by a hospital or health system. *See Op. Br.* at 24-26. Most importantly, the regulation itself includes no practice-ownership requirement and draws no distinction between physician groups based on type of ownership. *See id.* PPSC also explained that using the ordinary dictionary definitions of the words used in the regulation, “private” and “physicians,” PPSC’s surgeons plainly qualify as “private physicians.” *See id.* at 25-26.

The Department and Rockwood respond by using a dictionary definition of “private practice”—a phrase which *is not used in the regulation*—and arguing that because PPSC is not a “private practice,” it cannot rely upon the Exclusive Use Exemption. *See Dept. Br.* at 9; *Rockwood Br.* at 12. This argument is inapposite for the simple reason that the phrase “private practice” is not used in the regulation. Moreover, as explained in PPSC’s opening brief, using Respondents’ definition of this phrase would mean that associates at law firms are not in “private practice” because they do not have an ownership interest in their firms. *See Op. Br.* at 25. Neither the Department nor Rockwood respond to this point, nor can they defend the logical flaw in their argument.

G. *Amisub* is the only judicial authority interpreting analogous regulatory language.

Finally, the Department and Rockwood argue that *Amisub of South Carolina Inc. v. South Carolina Department of Health and Environmental Control*, 403 S.C. 576, 743 S.E.2d 786 (2013), is distinguishable from the present case. *See* Dept. Br. at 14-16; Rockwood Br. at 15-16. Of course it is. The most significant difference is that *Amisub* applied South Carolina law, not Washington law. However, PPSC did not argue that *Amisub* is a precedent that this Court must follow. PPSC cited it because it is the only judicial opinion that PPSC could find that directly addresses the issue before this Court: Whether a CON exemption for private physicians may be relied upon by a physician practice owned by a hospital or health system. Given that neither the Department nor Rockwood cited any other judicial opinions addressing this issue, *Amisub* appears to be the only one. The reasoning of the South Carolina Supreme Court's opinion in *Amisub* is sound and, PPSC would argue, persuasive authority.

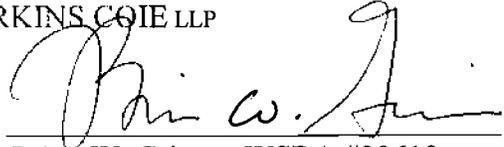
IV. CONCLUSION

The Department cannot adopt new CON rules without rulemaking. And the Department cannot avoid rulemaking, and exclude the public from its decision-making process, by describing new requirements as a "reinterpretation" of an existing rule. That is what the Department has attempted to do here.

The Court should determine that the New Requirements constitute rules that are invalid because the Department did not adopt them in compliance with statutory rulemaking requirements. If the Court determines that the New Requirements do not constitute rules, the Courts should determine that the Department's historical interpretation of the Exclusive Use Exemption was correct, that the Department's new interpretation is erroneous, and that PPSC's proposed action does not require CON approval, pursuant to the correct interpretation of the regulation.

Respectfully submitted this 23rd
day of December 2015.

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I certify that today I caused to be served the foregoing document on the following persons by email, pursuant to the parties' eservice agreement:

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

Signed this 23rd day of December, 2015, at Seattle, Washington.


Julie K. DeShaw

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