

No. 37157-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MULTICARE HEALTH SYSTEM,

Petitioner/Appellant,

vs.

DEPARTMENT OF HEALTH OF THE STATE OF WASHINGTON

and

FRANCISCAN HEALTH SYSTEM,

Respondents

MULTICARE'S OPENING BRIEF

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I. INTRODUCTION

This appeal relates to MultiCare Health System's ("MultiCare") proposed ambulatory surgery center ("ASC") in Gig Harbor, Washington, to be known as MultiCare Day Surgery of Gig Harbor ("MultiCare Day Surgery"). On January 12, 2006, the Department of Health (the "Department"), through its Certificate of Need Program (the "Program"), correctly determined that MultiCare Day Surgery is not subject to Certificate of Need ("CN") review by the Department. This decision is referred to as the Program's Determination of Non-Reviewability, or "DNR." MultiCare accordingly moved forward with the project.

Six months later, on July 3, 2006, Franciscan Health System ("Franciscan"), which operates "competing" outpatient surgery facilities in Gig Harbor and opposes the establishment of MultiCare Day Surgery, commenced an adjudicative proceeding to challenge the Program's DNR. In that proceeding, the Department's Health Law Judge, the Honorable Zimmie Caner (the "HLJ"), reversed the Program's DNR and concluded that MultiCare Day Surgery is, in fact, subject to CN review. This decision is referred to as the HLJ's "Final Order." MultiCare sought judicial review of the HLJ's Final Order in Thurston County Superior Court, before the Honorable Christine Pomeroy, who affirmed the HLJ's decisions. Under the Administrative Procedure Act (the "APA"), this Court sits in the same position as the Superior Court, and reviews the Department's decisions, not the Superior Court's decision.

MultiCare built its \$6.5 million ASC based on the Program's determination that the facility was not subject to CN review; now, due to the HLJ's reversal of the DNR, MultiCare is not permitted to actually use the two outpatient operating rooms in that facility, and the public is denied the option of obtaining treatment there. MultiCare respectfully requests that this Court reverse the HLJ's Final Order, and reinstate the Program's DNR, which would allow MultiCare to open its ASC, for two reasons. First, Franciscan's application for an adjudicative proceeding was not filed until more than five months after the deadline to do so, and the HLJ should have granted MultiCare's motion to dismiss the adjudicative proceeding on this ground. The HLJ did not have jurisdiction to review the DNR because the review proceeding was not timely commenced. Second, the Program's original analysis and DNR were correct—MultiCare Day Surgery is exempt from CN review—and the HLJ's decision to the contrary was based on a misinterpretation of the applicable regulation.

II. ASSIGNMENTS OF ERROR

1. The HLJ erred by denying MultiCare's motion to dismiss.
2. The HLJ erred by denying the Program's motion for summary judgment.
3. The HLJ erred by granting Franciscan's motion for summary judgment.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Issues Relating to Assignment of Error No. 1.

1. Whether Franciscan's application for adjudicative review was untimely because it was not filed within twenty (or twenty-eight) days following service of the Program's January 12, 2006 DNR.

2. Alternatively, whether Franciscan's application for adjudicative review was untimely because it was not filed within twenty days following service of the Program's June 6, 2006 letter discussing its DNR.

3. If Franciscan's application for adjudicative review was untimely, whether the HLJ had the authority to reverse the Program's DNR.

B. Issues Relating to Assignments of Error Nos. 2 and 3.

4. Whether the MultiCare Day Surgery satisfies the criteria for non-reviewability set forth in WAC 246-310-010(5).

5. Alternatively, whether there are disputed issues of material fact which precluded summary judgment in favor of Franciscan.

IV. STATEMENT OF THE CASE

A. MultiCare Seeks To Establish an Ambulatory Surgery Center in Gig Harbor.

MultiCare, a not-for-profit charitable organization based in Tacoma, Washington, is a leading-edge, integrated health organization made up of four hospitals (Tacoma General Hospital, Mary Bridge Children's Hospital & Health Center, Allenmore Hospital, and Good

Samaritan Hospital), numerous primary care and urgent care clinics, multi-specialty centers, hospice and home health services, and many other services. MultiCare serves patients at ninety-three locations in Pierce, South King, Kitsap, and Thurston Counties.

This proceeding involves MultiCare Day Surgery, which is MultiCare's proposed ASC in Gig Harbor. MultiCare Day Surgery will contain two operating rooms for outpatient surgical procedures, and will be used exclusively by the physicians of MultiCare Medical Associates. Administrative Record ("AR") 331. MultiCare Medical Associates is the private practice of fifty-three MultiCare-employed physicians. AR 330. MultiCare Medical Associates does not, for sake of clarification, include all physicians with privileges to practice at MultiCare's hospitals. The individual physicians who make up the MultiCare Medical Associates practice are identified in the administrative record, and the Program's DNR, at AR 26. MultiCare Day Surgery will be housed in a building that serves a number of other MultiCare Medical Associates functions, including offices for primary care physicians and specialists. AR 331.

B. MultiCare Day Surgery Is Not Subject To CN Review If It Falls Within the Closed ASC Exemption

In 1979, the Washington Legislature enacted the State Health Planning and Resources Development Act, RCW Ch. 70.38, creating the Certificate of Need Program to oversee health care planning, and to help further legislative goals in health planning such as providing accessible, quality health care to the residents of Washington, encouraging public

participation, and ensuring health care responsiveness to changing health and social needs. See RCW 70.38.015(1).

Under the Certificate of Need statutory framework, “[t]he construction, development, or other establishment of a new health care facility” is subject to CN review. RCW 70.38.105(4)(a) (emphasis added); see also WAC 246-310-020(1)(a). “Health care facility” is defined, in turn, to include “ambulatory surgical facilities.” RCW 70.38.025(6) (emphasis added); see also WAC 246-310-010(26).

“Ambulatory surgical facility” is defined, in turn, as follows:

‘Ambulatory surgical facility’ means any free-standing entity, including an ambulatory surgery center that operates primarily for the purpose of performing surgical procedures to treat patients not requiring hospitalization. This term does not include a facility in the offices of private physicians or dentists, whether for individual or group practice, if the privilege of using the facility is not extended to physicians or dentists outside the individual or group practice.”

WAC 246-310-010(5) (emphasis added) (Appendix, Ex. 1).

The critical language in this case is the last sentence of the “ambulatory surgical facility” definition, the “Closed ASC Exemption.” All the parties agree that, but for this exemption, MultiCare Day Surgery would be subject to CN review. All of the parties further agree that if MultiCare Day Surgery falls within the exemption, it is not subject to CN

review. Therefore, the question before the Department, and the question before the Court, is whether the Closed ASC Exemption applies to MultiCare Day Surgery.¹

C. The Program Determines That MultiCare Day Surgery Is Not Subject To CN Review.

On December 15, 2005, MultiCare applied for a determination that MultiCare Day Surgery falls within the Closed ASC Exemption, and is therefore not subject to CN review. The Program studied and granted MultiCare's request, issuing its DNR on January 12, 2006. AR 23-26 (Appendix, Ex. 2). The Program concluded 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. MultiCare accordingly moved forward with its Gig Harbor project, which is now complete.

D. The HLJ Reverses the Program's DNR.

On July 3, 2006, Franciscan filed an application for adjudicative proceeding, seeking review of the Program's January 12, 2006 DNR. MultiCare, supported by the Program, moved to dismiss the adjudicative

¹ The Department has determined that MultiCare Day Surgery would not satisfy the CN criteria for "need," because there is a sufficient existing supply of operating rooms in the Central Pierce County planning area (which includes the hospitals and other facilities in Tacoma, as well as those in Gig Harbor) to meet demand for surgical procedures in that planning area. AR 486. Therefore, whether MultiCare Day Surgery falls within the Closed ASC Exemption is determinative of whether MultiCare may provide outpatient surgeries there.

proceeding, on the ground that the application was not timely filed. On December 6, 2006, the HLJ denied MultiCare's motion. AR 311-15 (Appendix, Ex. 3). Franciscan moved for summary judgment, asking the HLJ to rule that MultiCare Day Surgery is subject to CN review and reverse the Program's DNR; the Program cross-moved for summary judgment, asking the HLJ to rule that MultiCare Day Surgery is not subject to CN review and affirm the Program's DNR. On January 29, 2007, the HLJ granted Franciscan's motion and denied the Program's motion. AR 484-98 (Appendix, Ex. 4). Therefore, no hearing was actually held before the HLJ, and the administrative record consists primarily of the briefing on these dispositive motions.

E. The Superior Court Affirms the HLJ's Decisions.

MultiCare sought judicial review of the HLJ's decisions in Thurston County Superior Court, before the Honorable Christine Pomeroy. CP 4-29. On January 8, 2008, the Superior Court affirmed the HLJ's decisions. CP 45-47.

F. MultiCare Appeals the Superior Court's Decisions to this Court.

MultiCare timely appealed the Superior Court's order affirming the HLJ's decisions. CP 39-42, 48-55.

V. ARGUMENT

A. Standard of Review.

"On appeal, this Court reviews the [agency's] decision, not the decision of the superior court." King County v. Central Puget Sound

Growth Mgmt. Hearings Bd., 142 Wn.2d 543, 553, 14 P.3d 133 (2000).

The Court “appl[ies] the standards of RCW 34.05 directly to the record before the agency, sitting in the same position as the superior court.” Id.

The Court should reverse the HLJ’s decisions if the Court determines that the HLJ has acted outside of her “statutory authority or jurisdiction,” or “has engaged in unlawful procedure . . . or has failed to follow a prescribed procedure,” or has “erroneously interpreted or applied the law,” or her decision “is inconsistent with a rule of the agency” without “a rational basis for inconsistency.” RCW 34.05.570(3)(b)-(d) and (h). The Court reviews issues of law, including interpretation of an agency’s regulations, de novo. Cobra Roofing Serv., Inc. v. Dep’t of Labor & Indus., 122 Wn. App. 402, 409, 97 P.3d 17 (2004). Under this standard, the Court “may substitute its interpretation of the law for that of the agency.” R.D. Merrill Co. v. Pollution Control Hearings Bd., 137 Wn.2d 118, 142-43, 969 P.2d 458 (1999). With respect to Franciscan’s motion for summary judgment that MultiCare Day Surgery is subject to CN review, the motion also should have been denied unless “there is no genuine issue as to any material fact,” CR 56(c), considering “all facts and reasonable inferences . . . in a light most favorable to the nonmoving party[.]” Cowlitz Stud Co. v. Clevenger, 157 Wn.2d 569, 573, 141 P.3d 1 (2006).

B. The Court Should Reinstate the Program's DNR Because It Was Not Timely Appealed.

1. The Program's January 12, 2006 DNR was a binding applicability determination pursuant to WAC 246-310-050.

MultiCare's application for a determination of non-reviewability was submitted on December 14, 2005, pursuant to WAC 246-310-050. AR 44-83. Under this regulation, "[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).

The Department was required to respond to MultiCare's request within thirty days. See WAC 246-310-050(3). The Program complied with this requirement, and issued its DNR on January 12, 2006. AR 23-26. Following its analysis, the Program concluded as follows:

[T]he 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. Given the unambiguous language of the Program's DNR—"the proposed ASC is not subject to Certificate of Need Review"—there can be no doubt that this decision was dispositive. Consistent with this, the Department's internal status report for MultiCare's Gig Harbor ASC

identifies the January 12, 2006 DNR as the agency's "Final Action." AR 161.

"A written applicability determination on an action in response to a written request and based on written information shall be binding upon the department: Provided, The nature, extent, or cost of the action does not significantly change." WAC 246-310-050(5). Thus, the Program's January 12, 2006 DNR was "final" and "binding," and MultiCare was entitled to rely upon it.

2. Franciscan failed to apply for an adjudicative proceeding within twenty days as required by WAC 246-10-203(1)(a)(3).

If Franciscan wished to seek adjudicative review of the DNR, it was required to file an application for adjudicative review within twenty days of the decision. See WAC 246-10-203(1)(a)(iii). The deadline to apply for adjudicative review was therefore February 1, 2006. Franciscan did not do so. Franciscan waited until July 3, 2006, to file an application for adjudicative proceeding. This was more than five months after the February 1 deadline to do so. AR 1.²

² The Program does not necessarily agree that the 20-day deadline contained in WAC 246-10-203(1)(a)(iii) applies to an application for adjudicative review of a DNR. Indeed, according to the Program, there is no right in the first place to an adjudicative proceeding to contest a DNR, although the Program has the discretion to grant one. However, the Program agrees with MultiCare that the adjudicative proceeding should have been dismissed as untimely, because Franciscan was required to file an application for adjudicative proceeding within a "reasonable time" following the January 12, 2006 DNR, which is "determined by analogy to the time allowed for appeal of a similar decision as prescribed by statute, court rule, or similar provision" – in this case, either 20 days under WAC 246-10-203(1)(a)(i) and (iii), or 28 days under WAC 246-10-310(1)(a)(ii) and 246-310-610(2). AR 595-97. Whatever the analysis, an application for adjudicative proceeding filed six months after the decision must be considered untimely.

Franciscan admits that it learned of the DNR on approximately January 19, 2006, one week after the DNR was issued. AR 3. Therefore, even if Franciscan could argue, hypothetically, that the regulatory and statutory deadlines to seek review should not begin to run until it had actual knowledge of the DNR, this would only toll the deadline to apply for adjudicative review until February 8, 2006. Franciscan's application was still filed nearly five months late.

3. An untimely application for an adjudicative proceeding results in the loss of any right to an adjudicative proceeding, pursuant to RCW 34.05.440(1).

Under the APA, the “[f]ailure 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[.]” RCW 34.05.440(1) (emphasis added). Therefore, by not timely filing an application for adjudicative proceeding, Franciscan waived any right to do so.

The deadline to seek administrative review is not a mere technicality. Rather, it “is mandatory and jurisdictional” – like other deadlines to commence appeals. Rust v. W. Wash. State Coll., 11 Wn. App. 410, 415, 523 P.2d 204 (1974) (emphasis added). Such deadlines are necessary to ensure the timely resolution of issues and the finality of decisions. Therefore, the HLJ did not merely have the discretion to dismiss the adjudicative proceeding, it was mandatory that she do so, because she lacked jurisdiction to review the Program’s DNR.

“An agency may exercise only those powers granted to it by the Legislature.” Erection Co. v. Dep’t of Labor and Indus., 121 Wn.2d 513, 519, 852 P.2d 288 (1993). An agency cannot review a decision after it has lost the statutory jurisdiction to do so. Id. at 518 (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”). With respect to adjudicative proceedings, the Department’s jurisdiction is limited to reviewing only those decisions which are timely appealed. RCW 34.05.440(1) (“[f]ailure of a party to file an application for an adjudicative proceeding within the time limit . . . constitutes a default”); see also WAC 246-10-203(1)(a) (“An application for adjudicative proceeding must be filed in accordance with the following time periods . . .”).

4. Franciscan cannot manufacture a new decision date by writing letters to the Department.

Following issuance of the DNR, Franciscan wrote letters to the Department regarding the DNR. Franciscan argued below that it was not really appealing the DNR itself. Instead, Franciscan contends, it was appealing a responsive letter written by the Department on June 6, 2006, which Franciscan characterizes as “the Department’s June 6, 2006 confirmation of its January 12, 2006 determination that MHS is entitled to a DNR for its Gig Harbor ASC as set forth in the Department’s January 12, 2006 letter to MHS.” AR 2. The HLJ agreed with Franciscan and denied MultiCare’s motion to dismiss on this ground, determining that the

“Program’s January 12, 2006 DNR letter was not its final decision;” rather, the “Program’s June 6, 2006 . . . letter was its final decision.” AR 314.

The HLJ’s determination is contrary to the Department’s own internal documents, which identify the January 12, 2006 DNR as the agency’s “Final Action.” AR 161. Additionally, the HLJ’s decision cannot be reconciled with what the Department actually wrote in its June 6, 2006 letter. In that letter, the Department merely advised MultiCare that if MultiCare Day Surgery were to be used by “additional part-time MultiCare physicians,” as opposed to the full-time MultiCare Medical Associates physicians identified in the Program’s DNR, it would no longer fall within the Closed ASC Exemption, and would be subject to CN review. AR 20-21. This was the only issue raised in the letter. It was not a “confirmation” of the DNR; rather, it was a warning to MultiCare that if it strayed from the terms of the DNR, its facility would no longer be exempt. This warning was consistent with WAC 246-310-050(5), which provides that the DNR is binding on the Department unless “[t]he nature, extent, or cost” of the project “significantly change[s].” WAC 246-310-050(5).

As background for this June 6 letter, in the January 12, 2006 DNR, the Program specifically stated that its determination was based on MultiCare Day Surgery being used exclusively by the physicians of MultiCare Medical Associates, the current members of which it identified in an attachment to the DNR. AR 23, 26. On March 31, Franciscan wrote

to the Department that it “has reason to believe that MultiCare may be employing physicians on a part-time basis for the sole purpose of allowing those physicians to use the MultiCare Gig Harbor ASC. These physicians are being employed solely during those periods of time that they are actually using the MultiCare Gig Harbor ASC.” AR 90. On April 28, the Department asked MultiCare to respond to this allegation, because “if this was happening, the ASC would no longer qualify as a CN exempt facility.” AR 92. On June 6, in the letter Franciscan now claims was the agency’s final action, the Department again stated that the fact that the “physicians using the ASC were full-time MultiCare employees was essential to the department’s conclusion that the proposed facility was exempt from the CN law” and if “additional part-time MultiCare physicians would use the facility” it would no longer be exempt. AR 20-21. MultiCare confirmed, on June 13, that MultiCare Day Surgery would not be used by additional, part-time physicians. It would be “limited to . . . the physicians listed in the application, and their full-time replacements and additions.” AR 114.

An opponent of an agency decision cannot artificially extend the deadline to appeal by writing letters to the Department about the decision and then appealing from the Department’s letters in response. There is no provision for reconsideration of a DNR. Moreover, it would be contrary to the whole philosophy of the regulation, which requires the Department to respond to the request within thirty days, if the process were to be strung out through several months of correspondence between the

Program and a protesting party which, for whatever reason, has chosen not to timely request formal adjudicative review of the decision.

In this case, Franciscan asked the Department, after the DNR was issued, to apply the DNR in a way that Franciscan favored: limiting use of MultiCare Day Surgery to the full-time employees of MultiCare Medical Associates. When the Department acquiesced to Franciscan's request, and so advised MultiCare, Franciscan claimed to appeal from the very statement it requested, in order to bootstrap its way into an appeal of a decision six months earlier that it opposed and failed to appeal.

Franciscan disputes nothing, and appealed from nothing, in the Program's June 6 letter. In fact, the Program stated in its June 6 letter exactly what Franciscan asked it 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. The Program explained this point very well in its brief in support of MultiCare's motion to dismiss:

The Program's January 12 DOR is still i[n] place, and was not impacted by the June 6 letter. In fact, FHS actually agrees with the point of the June 6 letter: that the DOR does not allow MultiCare to operate an exempt ASC using part-time physicians. Given the content of the June 6 letter, it simply makes no sense that the letter would start a new appeal period for the January 12 DOR.

AR 153 (emphasis added).

Franciscan was free to send as many letters as it wished to send to the Department questioning the basis for the January 12 DNR. If Franciscan wished for the Department actually to conduct an adjudicative review of that decision, however, Franciscan was required to formally and timely request one. Sending letters is not a substitute for filing an application for an adjudicative proceeding pursuant to the specific requirements of the APA.

The Program's DNR was issued on January 12, 2006. This was confirmed by the declaration testimony of both Bart Eggen, the Manager of the Department of Health Office of Certification and Technical Support, to whom the CN Program reports, and Richard McCartan, the Assistant Attorney General responsible for representing the Department in Certificate of Need matters. AR 157, 163-64. After the deadline for Franciscan to appeal that decision lapsed, MultiCare had the right to rely on that decision as final, and to proceed with its project without risk that the DNR would be reversed on adjudicative review. Franciscan knew about the DNR by January 19, but waited nearly six months before filing an application for an adjudicative proceeding on July 3. The HLJ did not have jurisdiction to review the Program's DNR, and the Court should reverse the HLJ's Final Order and reinstate the Program's DNR on this ground.

5. Even If Franciscan Was Appealing From the June 6 Letter, Its Application Was Untimely Pursuant to WAC 246-10-203(1)(a)(iii).

The HLJ stated in her Final Order that the deadline to commence an adjudicative proceeding is either twenty or twenty-eight days. AR 314-15. However, she concluded that because “Franciscan filed its request for an adjudicative proceeding on the 20th day following its receipt of Program’s final DNR letter, its appeal is timely filed under either the 20 or 28 day limitation[.]” AR 315. She did not resolve the issue of whether the deadline is twenty or twenty-eight days. AR 315. The HLJ’s mistake here was to count days from Franciscan’s receipt of a copy of the June 6 letter, rather than from the date the letter was served on MultiCare. The regulation plainly states that the deadline is twenty days after “service” of the relevant document. WAC 246-10-203(1)(a)(iii). 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. This occurred on June 6. Franciscan’s application was filed on July 3, twenty-seven days later. Because the deadline for Franciscan to commence an adjudicative proceeding was twenty days, its application was untimely even if it really was appealing from the June 6 letter. See WAC 246-10-203(1)(a)(iii) (20-day deadline to commence adjudicative proceeding applicable to “all other matters” which do not have a specific deadline).

Because Franciscan's application for adjudicative proceeding was untimely, and the HLJ did not have jurisdiction to conduct an adjudicative proceeding, the HLJ's Final Order should be reversed pursuant to RCW 34.05.570(3)(b)-(d) and (h).

C. The Court Should Reinstate the Program's DNR Because MultiCare's Facility Is Not Subject To CN Review.

If the Court determines that the Program's DNR was not timely appealed by Franciscan, it should reinstate the DNR on this ground, and need not reach the question of whether MultiCare Day Surgery meets the criteria of the Closed ASC Exemption. If, however, the Court determines that Franciscan did timely appeal the DNR, it still should reinstate the DNR because MultiCare Day Surgery is not subject to CN review. The Court should reverse the HLJ's determination to the contrary under RCW 34.05.570(3)(d), because the HLJ erroneously interpreted or applied the law, and RCW 34.05.570(3)(h), because the HLJ's order was inconsistent with the agency regulation.

1. If MultiCare Day Surgery is in the office of private physicians and closed to physicians outside that practice, it is not subject to CN review.

As discussed above, if MultiCare Day Surgery falls within the Closed ASC Exemption, it is not subject to CN review. The exemption applies to "a facility in the offices of private physicians or dentists, whether for individual or group practice, if the privilege of using the facility is not extended to physicians or dentists outside the individual or

group practice.” WAC 246-310-010(5). Whether MultiCare’s Gig Harbor ASC falls within the Closed ASC Exemption therefore requires a two-pronged analysis: (1) whether the facility is in the office of private physicians, and (2) whether the facility is closed to physicians outside that private practice.

2. The Court should interpret WAC 246-310-010(5) based on its plain language.

The Court “interprets a WAC provision to ascertain and give effect to its underlying policy and intent.” Dep’t of Licensing v. Cannon, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). “To determine that intent, the court looks first to the language of the provision. 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.” Id. (emphasis added). Moreover, the Court “will not add to or subtract from the clear language of a statute, rule, or regulation even if it believes the [agency] . . . intended something else but did not adequately express it unless the addition or subtraction of language is imperatively required to make the [regulation] rational.” Id. at 57.

WAC 246-310-010(5) is indeed “clear on its face.” To be exempt from CN review, an ASC need only be (1) in the offices of private physicians and (2) not available to physicians outside that practice. The Court should not second-guess whether this is too large an exemption, or whether it unfairly benefits hospitals, or whether it is sound health planning. The Court should not add terms. Rather, the Court should

derive the meaning of this regulation “from the plain language . . . alone.”
Cannon, 146 Wn.2d at 56.

3. MultiCare Day Surgery is in the office of private physicians.

MultiCare Day Surgery is “in the offices of private physicians” and therefore satisfies the first prong of the exemption. MultiCare Day Surgery would be established by MultiCare Medical Associates, the practice of the fifty-three private physicians identified in the DNR. AR 26. MultiCare Day Surgery would not only be in the same legal entity as MultiCare Medical Associates, AR 23, it would be physically “in the office” of MultiCare Medical Associates, as it would be located in the same building as the Gig Harbor-based physicians of MultiCare Medical Associates, at 4709 Point Fosdick Drive NW, Gig Harbor, WA. AR 23.

4. MultiCare Day Surgery will be closed to physicians outside the private practice.

MultiCare Day Surgery will be closed to physicians outside MultiCare Medical Associates, and therefore also satisfies the second prong of the exemption. It is undisputed that if, for example, MultiCare Day Surgery were to be open to all physicians with privileges to practice at MultiCare’s Tacoma General Hospital, the ASC would not be exempt from CN review. This is not the case, however, as the Program recognized in its DNR, and MultiCare has confirmed. AR 23, 114. “No other physician outside of the practice would have access to the proposed ASC.” AR 23.

5. The Program correctly issued the DNR.

Because MultiCare Day Surgery satisfies both prongs of the Closed ASC Exemption, the Program correctly concluded “that the establishment of the ASC associated with the MultiCare Medical Associates practice does not meet the definition of an [ambulatory surgical facility] under the Certificate of Need provisions of Washington Administrative Code (WAC) 246-310-010” and, therefore, “the proposed ASC is not subject to Certificate of Need review.” AR 24. This was a relatively simple determination, applying the requirements of the straightforward Closed ASC Exemption to the circumstances of MultiCare Day Surgery.

6. The HLJ erred in reversing the DNR.

The HLJ reversed the Program’s DNR based on a misinterpretation of the regulatory language. Specifically, the HLJ appears to have read several new requirements into the exemption which simply do not appear in the text.

First, the HLJ’s decision was based on the fact that MultiCare Medical Associates is a division of MultiCare Health System, as opposed to “a closely held corporation owned by the physicians[.]” AR 491. There is, of course, no requirement in the exemption that the private physicians personally own the facility, or that their practice be a closely held corporation, as opposed to a division of a larger entity.

Second, the HLJ’s decision was based on the fact that MultiCare Medical Associates is not a “group practice” as that term is defined in 42

C.F.R. 411.352(a), which is a federal regulation promulgated pursuant to § 1877 of the Social Security Act, 42 U.S.C. § 1395nn, generally known as the “Stark Law” after its sponsor, U.S. Rep. Pete Stark. AR 494-95. The Stark Law prohibits self-referrals in the Medicaid system. With respect to Washington State Certificate of Need law, however, the phrase “group practice” merely appears within the regulation to clarify that the exemption is not limited to individual doctors; rather, it applies equally to all private physicians, “whether for individual or group practice.” WAC 246-310-010(5) (emphasis added). The HLJ’s interpretation of this regulation to mean that for an ASC to be exempt, it must be in the office of either an individual physician or a group practice as narrowly defined for purposes of federal Medicaid reimbursement, is a far cry from giving the regulation its “plain and ordinary” meaning. The plain language of the regulation says that the exemption is available to all private physicians, whether individuals or groups, so long as use of their facility is limited to those physicians.³

³ With the Stark amendment, the federal government adopted one of the most Byzantine regulatory structures ever conceived. 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 Stark Law is difficult enough to apply even within its own narrow regulatory context; it would be a terrible place to look for help in understanding other, unrelated regulations, such as Washington CN law. The federal government itself has stated that the “group practice” definition in the Stark Law is not applicable for purposes other than the Stark Law itself:

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.

Third, the HLJ's decision was based on "a large . . . hospital owning and operating the facility in question." AR 496. However, the Department has never, until now, excluded either hospital-employed private physicians, or large groups of private physicians, from taking advantage of the Closed ASC Exemption, just like everyone else. Typically, when a hospital builds an ASC, it will not want to limit it to its employed physicians, but rather will want it to be available to all physicians with privileges to practice at the hospital, and will therefore apply for a certificate of need. However, if a hospital wants to establish a closed ASC exclusively for its employed-physician practice, it is permitted to do so just like any other private physician practice. Two examples are illustrative.

Virginia Mason's ASC in Federal Way was available to the 480 physicians employed by Virginia Mason, nearly ten times as many physicians as are employed by MultiCare Medical Associates. See AR 370 (Evaluation of the CN Application Submitted by Virginia Mason Med. Ctr. Proposing to Establish a Free-Standing ASC in Federal Way (Wash. Dep't of Health October 17, 2006) ("Virginia Mason"), at 1). So long as the facility was "open only to members or employees of [Virginia Mason's] group practice," regardless of how many employees that may be,

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). In other words, the definition of "group practice" for purposes of the Stark Law is not necessarily applicable even to other aspects of Medicare regulation. It certainly is not applicable to Washington CN law.

it was “an exempt facility.” AR 373 (Virginia Mason, at 4). However, if Virginia Mason were to “allow non-VMMC physicians to serve patients” at the ASC, it would lose its exemption. Id. Neither the large number of physicians in the Virginia Mason group practice, nor the fact that they were employed by Virginia Mason, was relevant to the question of whether the facility satisfied the two prongs of the Closed ASC Exemption.

Similarly, the Department determined that an ASC to be established by Kennewick General Hospital, known as KGH Medical Mall, was exempt from CN review. 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. See AR 188 (Determination of Non-Reviewability re KGH Medical Mall (Wash. Dep’t of Health May 9, 2002) (“Kennewick”), at 1). 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.

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 (Kennewick, at 2).

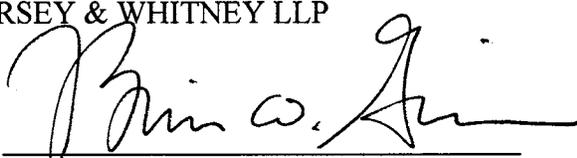
By rewriting the regulation to prevent hospitals from establishing ASCs limited to their employed-physician practices, exempt from CN review, the HLJ treated MultiCare Health System differently than the Department has treated every other hospital that has done this, including Virginia Mason with respect to its ASC in Federal Way and Kennewick General Hospital with respect to its ASC in Kennewick. Moreover, to do so the HLJ misinterpreted the regulation by ignoring its plain meaning, and instead reading in additional requirements which simply are not in the text. There is no “ownership,” or “Stark Law group practice,” or “non-hospital,” or “maximum size” limitation in WAC 246-310-010(5). This interpretation is contrary to the plain language of the regulation as well as longstanding Department practice. If the Department wishes to narrow the scope of the Closed ASC Exemption, it may do so pursuant to proper rulemaking procedures. But a Health Law Judge may not shortcut this process by misinterpreting what is actually written in the regulation now.

VI. CONCLUSION

The HLJ erred as a matter of law by (1) conducting an adjudicative proceeding, even though no application was timely filed, which was necessary to invest the HLJ with jurisdiction, and (2) determining that MultiCare Day Surgery is not exempt from CN review. The HLJ's first error violates important principles of limited agency jurisdiction, as conferred by the Legislature, and the integrity and finality of decisions where there is not a timely appeal. The HLJ's second error violates important principles of regulatory interpretation and agency decision-making. It is therefore critical that this Court correct these legal errors by reversing the HLJ's Final Order and reinstating the Program's DNR.

Respectfully submitted this 31st day of March 2008.

DORSEY & WHITNEY LLP

By: 

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PROOF OF SERVICE

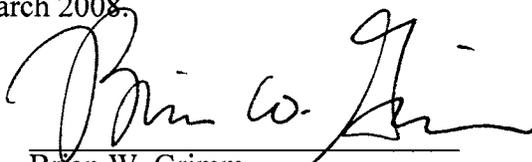
Today I caused the foregoing MULTICARE'S OPENING BRIEF
to be served on the following persons by U.S. Mail:

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STATE OF WASHINGTON
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DATED this 31st day of March 2008.



Brian W. Grimm

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Exhibit 1

WAC 246-310-010(5):

'Ambulatory surgical facility' means any free-standing entity, including an ambulatory surgery center that operates primarily for the purpose of performing surgical procedures to treat patients not requiring hospitalization. This term does not include a facility in the offices of private physicians or dentists, whether for individual or group practice, if the privilege of using the facility is not extended to physicians or dentists outside the individual or group practice.

Exhibit 2



STATE OF WASHINGTON
DEPARTMENT OF HEALTH

January 12, 2006

1/12/06 17

John R. Long, Strategy Executive
MultiCare Health System
315 Martin Luther King Jr. Way
Post Office Box 5299
Tacoma, Washington 98415

Dear Mr. Long:

Thank you for your Ambulatory Surgical Center Determination of Non-Reviewability (DOR) Application and documentation received in the Certificate of Need office on December 15, 2005. Below are the facts relied upon by the Certificate of Need Program in reaching its conclusion regarding your interest in establishing an Ambulatory Surgical Center (ASC) associated with a division of MultiCare Health System known as MultiCare Medical Associates. The ASC would be known as MultiCare Day Surgery of Gig Harbor.

FACTS

- MultiCare Medical Associates is a division of MultiCare Health System that oversees the employed providers of MultiCare Health System.
- MultiCare Medical Associates proposes to establish an ASC at 4709 Point Fosdick Drive Northwest, in the city of Gig Harbor, within Pierce County.
- Currently, there are 53 physicians associated with MultiCare Medical Associates practice [see listing attached to this letter].
- No other party has an ownership in the MultiCare Medical Associates.
- The ASC will be located in the same building as the Gig Harbor based physicians at 4709 Point Fosdick Drive Northwest, in the city of Gig Harbor, within Pierce County.
- The ASC will not be structured as a separate legal entity from the MultiCare Medical Associates practice.
- No other physician outside of the practice would have access to the proposed ASC. (Future owners or employees of the MultiCare Medical Associates practice will be allowed access to the ASC.)
- Procedures to be performed at the ASC are anesthesiology/pain management, ENT, general surgery (adult and pediatric), neurosurgery, OB/GYN, orthopedic (adult and pediatric) gastroenterology (adult and pediatric), podiatry, urology, and vascular surgery..
- Management of the ASC will be provided by Tacoma General/Allenmore Hospital, a division of MultiCare Health System under a management agreement [agreement provided with DOR request].



000023

- Billing for the ASC is provided by Tacoma General/Allenmore Hospital under the management agreement.

ANALYSIS

- Revised Code of Washington (RCW) 70.38.105(4) identifies the types of projects subject to prior Certificate of Need review and approval. Subsection (a) identifies that the construction, development, or other establishment of a new health care facility is subject to CON review.
- RCW 70.38.025(6) defines "health care facility" as *hospices, hospice care centers, hospitals, psychiatric hospitals, nursing homes, kidney disease treatment centers, ambulatory surgical facilities, and home health agencies, and includes such facilities when owned and operated by a political subdivision or instrumentality of the state and such other facilities as required by federal law and implementing regulations, but does not include any health facility or institution conducted by and for those who rely exclusively upon treatment by prayer or spiritual means in accordance with the creed or tenets of any well-recognized church or religious denomination, or any health facility or institution operated for the exclusive care of members of a convent as defined in RCW 84.36.800 or rectory, monastery, or other institution operated for the care of members of the clergy. In addition, the term does not include any nonprofit hospital: (a) Which is operated exclusively to provide health care services for children; (b) which does not charge fees for such services; and (c) if not contrary to federal law as necessary to the receipt of federal funds by the state.*
- Washington Administrative Code (WAC 246-310-010) defines "ambulatory surgical facility" as *any free-standing entity, including an ambulatory surgery center, that operates primarily for the purpose of performing surgical procedures to treat patients not requiring hospitalization. This term does not include a facility in the offices of private physicians or dentists, whether for individual or group practice, if the privilege of using such facility is not extended to physicians or dentists outside the individual or group practice.*

CONCLUSION

Based on the above factual information provided on behalf of MultiCare Medical Associates, the 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.

Please note: This determination is not transferable and is based on the facts submitted in the exemption application. Prior Certificate of Need review and approval may be required under the provisions of WAC 246-310-020 if changes occur in the facts as presented in the DOR application. Prior Certificate of Need review and approval may be required under the provisions of WAC 246-310-020 if any of the following changes occur:

- 1) should MultiCare Medical Associates later decide to extend the privilege of using the ASC to physicians not part of the group practice; OR
- 2) should MultiCare Medical Associates decide to expand the scope of services at the ASC to include services subject to Certificate of Need review under the provisions of WAC 246-310-020; OR

- 3) should MultiCare Medical Associates decide to organize the ASC as a separate legal entity from the group practice; OR
- 4) should any entity other than MultiCare Medical Associates hold the Medicare certification; OR
- 5) should the ASC cease operations or relinquish its Medicare certification and then choose to resume services as an ASC; OR
- 6) should the practice and or ASC be purchased or leased.

This Determination of Non-Reviewability does not constitute approval under any other local, federal, or state statute, or implementing rules and regulations. Examples where additional approval may be necessary include, but are not limited to, construction plan approval through the Construction Review Section of the Department of Health, facility licensing/certification through the Department of Social and Health Services or Department of Health, and other federal or local jurisdiction permits.

Please call me at (360) 236-2957 if you have any further questions as you proceed with establishment of the ASC.

Sincerely,



Karen Nidermayer, Analyst
Certificate of Need Program
Office of Certification and Enforcement

cc: Office of Health Care Survey

000025

PHYSICIAN LIST

F NAME	L NAME	SPECIALITY
BISHER	ABDULLA	PEDIATRIC GI
CLYDE	ADDISON	FAMILY PRACTICE/OB
STEPHEN	BAKER	ORTHOPEDIC SURGERY
LESLIE	BALLARD	OB/GYN
PETER	BROWN	NEUROSURGERY
JOHN	CHAPPELL	PEDIATRIC GENERAL SURGERY
JARED	CLIFFORD	PODIATRY
STEPHEN	COBERT	ENT
JUDITH	COOK	VASCULAR SURGERY
DAVID	COONS	ORTHOPEDIC SURGERY
MICHAEL	DEBERARDINIS	UROLOGY
ERIN	DODGE	FAMILY PRACTICE/OB
JOSEPH	FAULKNER	GENERAL SURGERY
STEPHEN	FUSON	PODIATRY
JAMES	GARDINER	ORTHOPEDIC SURGERY
ELISA	GARZA	NEUROSURGERY
NICHOLAS	HEATH	PODIATRY
CHRISTINA	HITCHCOCK	OB/GYN
RANDALL	HOLLAND	PEDIATRIC GENERAL SURGERY
LOUIS	JACOBSON	ANESTHESIOLOGY/PAIN MANAGEMENT
ANDREW	JOHNSON	PODIATRY
DIANA	KING	FAMILY PRACTICE/OB
GENE	KNUTSON	PODIATRY
STEPHEN	KRAMP	FAMILY PRACTICE/OB
MARY ANN	LEE	OB/GYN
HELEN	LOUIE	OB/GYN
LESLIE	MALO	PEDIATRIC GENERAL SURGERY
HAN	MAO-TANG	PEDIATRIC GENERAL SURGERY
KEITH	MAYO	ORTHOPEDIC SURGERY
ROBERT	MCBRIDE	PODIATRY
WILLIAM	MORRIS	NEUROSURGERY
CATHERINE	MUSEMECHE	PEDIATRIC GENERAL SURGERY
JEFFREY	NACHT	ORTHOPEDIC SURGERY
TIMOTHY	NEFF	OB/GYN
KHAHN	NGUYEN	FAMILY PRACTICE/OB
LYNN	PAGE	ORTHOPEDIC SURGERY
ESTHER	PARK-HWANG	OB/GYN
LISA	PHILICHI	PEDIATRIC GASTROENTEROLOGY
GREGORY	POPICH	ORTHOPEDIC SURGERY
JOHN	RACETTE	ORTHOPEDIC SURGERY
NICHOLAS	RAJACICH	PEDIATRIC ORTHOPEDIC
BRIAN	READY	ANESTHESIOLOGY/PAIN MANAGEMENT
WALTER	ROONEY	ENT
SCOTT	RUDE	PODIATRY
PATRICIA	RUSSELL	FAMILY PRACTICE/OB
RICHARD	SCHROEDER	OB/GYN
VICTORIA	SILAS	PEDIATRIC ORTHOPEDIC
OMMA	VAIDYA	OB/GYN
KERRY	WATRIN	FAMILY PRACTICE/OB
GREGORY	WEBB	PODIATRY
DAVID	WEEKS	UROLOGY
ANDREA	YOUNG	ORTHOPEDIC SURGERY
MELAWATI	YUWONO	PEDIATRIC GASTROENTEROLOGY

Exhibit 3

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICES UNIT**

In Re: Determination of Non-Reviewability)	
Decision by Department of Health re:)	Docket No. 06-07-C-2001CN
MULTICARE HEALTH SYSTEM'S)	
GIG HARBOR AMULATORY)	PREHEARING ORDER NO. 4:
SURGERY CENTER,)	ORDER DENYING MOTION
)	TO DISMISS
FRANCISCAN HEALTH SYSTEM,)	
)	
Petitioner.)	
_____)	

Multicare Health System (Multicare) filed a motion to dismiss the Franciscan Health System (Franciscan) petition for adjudicative review of the Department of Health Certificate of Need Program (Program) determination of non-reviewability. Multicare asserts that Franciscan's petition was not timely filed. Program supports Multicare's motion to dismiss. Motion denied.

BACKGROUND

1.1 On May 17, 2005, Multicare applied to Department of Health's Program for a certificate of need (CN) to establish a new ambulatory surgery center/facility (ASC) in Gig Harbor. On November 1, 2005 after the review of Multicare's CN application, Program denied Multicare's application for a new ASC in Gig Harbor. During the review process, Franciscan participated as an "interested" and "affected" party¹.

¹ WAC 246-310-10 defines "Affected person" as a person who is located or resides in the applicant's service area, testified at a public hearing or submitted written evidence, and requested in writing to be informed of Program's decision. "Interested persons" include health care facilities and health maintenance organizations providing services similar to the services under review and located in the health service area.

On November 22, 2005, Multicare filed a request for an adjudicative proceeding regarding the denial of its CN application. In December 2006 pursuant to an agreed order, Franciscan intervened in the adjudicative proceeding addressing Program's denial of Multicare's CN application for a new ASC.

1.2 After Multicare's CN application was denied, Multicare investigated whether its proposed Gig Harbor ASC qualifies for an exemption from CN review as a "group practice" ASC (a determination of non-reviewability).² While investigating this CN exemption, Multicare discussed this option with Program staff. On December 15, 2005, Multicare applied to Program for a determination of non-reviewability (DNR); that its proposed Gig Harbor ASC is not subject to the CN review under chapter 70.38 RCW and chapter 246-310 WAC.

1.3 Multicare's application for non-reviewability encompassed the same Gig Harbor ASC proposal for which Program denied a CN, except limiting the physicians who may treat patients at the Gig Harbor ASC. The Multicare DNR proposed facility limits access to physicians who are or will be employed by Multicare Medical Associates (MMA) and who will see and treat patients in the adjoining Multicare medical office facility.³

1.4 Franciscan was not provided a copy of Multicare's DNR application until Franciscan learned of its existence and requested a copy from Program. Soon after Franciscan received a copy of Multicare's DNR application, Franciscan sent a letter

² Pursuant to WAC 246-310-010 and WAC 246-310-050.

³ Procedures to be performed at the proposed Gig Harbor ASC include anesthesiology/pain management, ENT, general surgery, neurosurgery, OB/GYN, orthopedic, gastroenterology, podiatry, urology, and vascular surgery.

dated January 19, 2006 to Program raising objections and concerns regarding Multicare's DNR application.

1.5 On January 12, 2006, Program issued Multicare a DNR for its proposed Gig Harbor ASC. Franciscan was not provided a copy of the DNR letter at the time of its issuance. On January 20, 2006, Franciscan learned that Program issued a DNR letter to Multicare and requested a copy from Program. On January 27, 2006, Franciscan's Health Care Consultant called the Program manager to discuss the issues raised in Franciscan's January 19, 2006 letter that outlined its objections to the issuance of a DNR. On January 27, 2006, and again on later dates, Program staff informed Franciscan that it would or was in the process of investigating the issues Franciscan raised in its January 19, 2006 letter, such as Multicare's proposed ASC operating under Multicare's hospital license and permitting part-time MMA employed physicians to treat patients at the proposed ASC. Program's communications with Multicare and Franciscan regarding the issues raised by Franciscan clearly indicate that Program was reconsidering its Multicare Gig Harbor DNR decision.

1.6 On June 6, 2006 after reconsideration, Program issued its final decision on Multicare's Gig Harbor DNR application. Franciscan received a copy of the final DNR decision on June 12, 2006.

1.7 In the June 6, 2006 DNR decision, Program concluded that the use of part-time physicians materially changes the DNR proposal; and that the use of part-time physicians is not permitted under WAC 246-310-010 ASC "group practice" exception.⁴

⁴ Part-time employed physicians were not included in Multicare's original DNR application.

On June 21, 2006, Franciscan received a copy of a letter from Multicare's counsel addressed to Program stating that Multicare agrees not to use part-time employees, even though Multicare does not agree with Program's legal conclusion that precludes part-time MMA employed physicians from using the ASC under this DNR.

1.8 On July 3, 2006, Franciscan filed an application for an adjudicative proceeding regarding program's June 6, 2006 DNR determination.

1.9 A reasonable prudent person objectively reviewing the uncontested communications in the case at hand would conclude that Program's January 12, 2006 DNR letter was not its final decision; that Program informed Franciscan it would investigate issues raised in Franciscan's January 19, 2006 letter and therefore reconsider its DNR decision. Program's June 6, 2006 modified DNR letter was its final decision.

CONCLUSIONS OF LAW

2.1 RCW 34.05.413(1) of the Washington Administrative Procedures Act (APA) permits agencies to commence adjudicative proceedings under its jurisdiction. Under this statutory provision, parties may request an adjudicative proceeding to contest Program's DNR decisions. The general APA provision states that an agency shall provide "at least twenty days to apply for an adjudicative proceeding from the time that notice is given of the opportunity to file such an application." RCW 34.05.413. The general APA rules provide for 20 or 28 days depending on the issue. Neither of these provisions directly address DNR decisions. WAC 246-10-203(1)(a)(i) (20 days);

WAC 246-10-203(1)(a)(ii) (28 days). Since Franciscan filed its request for an adjudicative proceeding within 20 days, it is unnecessary to determine whether the 28 or 20-day period applies.

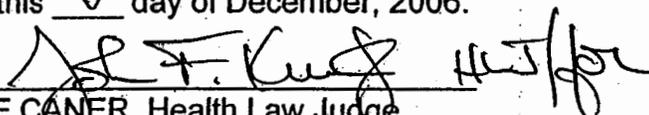
2.2 Certificate of need laws do not directly address the right to request an adjudicative proceeding of a DNR decision and as a result, does not state the time period within which a party must file a request for an adjudicative proceeding. CN regulations provide a 28-day period within which a CN applicant must request an adjudicative proceeding. WAC 246-310-610(2).

2.3 Since Franciscan filed its request for an adjudicative proceeding on the 20th day following its receipt of Program's final DNR letter, its appeal is timely filed under either the 20 or 28 day limitations set forth in the CN and APA rules.

ORDER

Multicare's motion to dismiss is DENIED.

Dated this 6th day of December, 2006.


ZIMMIE CANER, Health Law Judge
Presiding Officer

DECLARATION OF SERVICE BY MAIL

I declare that today I served a copy of this document upon the following parties of record:

DONALD W. BLACK AND THOMAS H. GRIMM, ATTORNEY'S AT LAW AND RICHARD MCCARTAN, AAG by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS 7th DAY OF DECEMBER, 2006.


Adjudicative Service Unit

cc: JANIS SIGMAN

PREHEARING ORDER NO. 4:
ORDER DENYING MOTION
TO DISMISS

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Exhibit 4

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICES UNIT

In Re: Determination of Non-Reviewability)

Decision by Department of Health re:)

MULTICARE HEALTH SYSTEM'S)

GIG HARBOR AMBULATORY)

SURGERY CENTER,)

)

FRANCISCAN HEALTH SYSTEM,)

)

Petitioner.)

Docket No. 06-07-C-2001CN

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APPEARANCES:

Petitioner, Franciscan Health System by
Ogden Murphy Wallace, P.L.L.C., per
Donald W. Black and Jeffrey D. Dunbar, Attorneys at Law

Department of Health Certificate of Need Program by
Office of the Attorney General, per
Richard A. McCartan, Assistant Attorney General

Intervenor, Multicare Health System by
Thomas H. Grimm, P.S., per
Thomas H. Grimm, Attorney at Law

Franciscan Health System (Franciscan) filed a motion for summary judgment.

Multicare Health System (Multicare) and Department of Health Certificate of Need
Program (Program) filed cross motions for summary judgment. Franciscan's motion is
granted.

ISSUE

Whether Multicare's proposed ambulatory surgery center falls within the
certificate of need exemption defined in WAC 246-310-010?

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PROCEDURAL BACKGROUND

In May 2005, Multicare applied to Program for a certificate of need to establish a new ambulatory surgery center in Gig Harbor. Program denied Multicare's application for a new proposed ambulatory surgery center (ASC), finding an insufficient need for the proposed ASC.¹

In December 2005, Multicare applied to Program for a determination of non-reviewability; that its ASC facility in Gig Harbor is not subject to the certificate of need review process under chapter 70.38 RCW and chapter 246-310 WAC.

In January 2006, Program issued Multicare a determination of non-reviewability for Multicare's proposed Gig Harbor ASC. Program concluded that Multicare's proposed ASC is exempt because it falls under the "private physicians" "group practice" exemption defined in WAC 246-310-010. Pursuant to Franciscan's request for reconsideration, Program reconsidered its determination of non-reviewability decision. Franciscan raised issues regarding the corporate ownership/operation of the proposed ASC and Multicare's part time employed physicians' privileges to treat patients at the proposed ASC.

In June 2006, after reconsideration, Program issued its final decision on Multicare's Gig Harbor determination of non-reviewability application. Program concluded that the part-time Multicare physicians' privileges to use the proposed ASC, materially changes Multicare's proposed ASC; and that the use of part-time physicians

¹ During the review process, Franciscan participated as an "interested" and "effected" party. Multicare filed a request for an adjudicative proceeding regarding the denial of its CN application. (Docket No. 05-11-C-2043CN). Franciscan is an intervening party in the adjudicative proceeding addressing the Program's denial of Multicare CN application for a new ASC.

is not permitted under WAC 246-310-010 "group practice" ASC exception. Multicare agreed not to use part-time employees, although Multicare does not agree that this is a limitation required for a determination of non-reviewability under WAC 246-310-010.

Franciscan appealed Program's June 2006 determination of non-reviewability that found Multicare's proposed Gig Harbor ASC exempt from a certificate of need review. The parties filed motions for summary judgment regarding the applicability of WAC 246-310-010 CN exemption to Multicare's proposed ASC.

I. FINDINGS OF FACT

1.1 Multicare's application for a determination of non-reviewability (DNR) is essentially the same ASC proposal as Multicare submitted in its certificate of need (CN) application. Program denied Multicare's CN application because it found insufficient need for Multicare's proposed ASC. Multicare's DNR application had one significant modification; the ASC would be a "closed" facility limited to Multicare employee physicians rather than an ASC open to all physicians who have hospital privileges at Multicare's hospital.

1.2 The proposed ASC would be located in a new medical facility that Multicare is constructing. Multicare would operate the ASC under one of its hospital licenses. The ASC would include two operating rooms (one shelled), pre- and post- operating rooms, and support staff areas. The new medical facility will house Multicare physician offices and examining rooms for primary care physicians (i.e., family and internal medicine) and specialists (i.e., urology and orthopedic surgeons). The physician offices and examining rooms will be shared and not limited to use of a specific

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physician. Most or all of the specialists will have two offices, one in Gig Harbor and one in another Multicare clinic in Pierce County.² The Multicare Medical Associates (MMA) surgeons would use the Gig Harbor ASC, physician offices, and examining rooms for treatment of patients primarily seen out of this facility.³ The Multicare facility (clinic) primary purpose is to provide patient health care rather than provide out-patient surgery.

1.3 Procedures to be performed at the proposed Gig Harbor ASC include anesthesiology/pain management, ENT, general surgery, neurosurgery, OB/GYN, orthopedic, gastroenterology, podiatry, urology, and vascular surgery. Multicare proposed to only permit physicians employed full-time by Multicare through MMA (a corporate division of Multicare) to treat patients at the Gig Harbor ASC. The proposal lists approximately 53 MMA physician employees. This number would increase and/or decrease as employees leave or are hired into MMA.

1.4 Multicare is a non-profit corporation that operates 3 hospitals, 20 physician clinics, 6 urgent care facilities and other health care services such as hospice care in the southwestern portion of the State of Washington. Multicare has several corporate divisions that conduct business under Multicare's corporate supervision and control.

² Multicare anticipates that patients who live in the Gig Harbor area will shift their care to Multicare's Gig Harbor ASC from operating rooms in Multicare's Tacoma and Allenmore Hospitals to avoid longer traveling distances. As a result of this shift, Multicare anticipates closing one operating room in each of these hospitals. Franciscan's St. Joseph Hospital is also located in Tacoma, and therefore, may also see a decrease in patient care from the Gig Harbor area. Location is one of many factors that effect where patients seek medical care. Choice of physician and physician's access to an ASU through hospital privileges or a group practice are other factors that effect patient choice.

³ MMA physicians are not precluded from referring patient to physicians outside of the MMA group.

MMA is one of Multicare's corporate divisions that Multicare oversees.⁴ Therefore, the physicians who would work at the ASC facility would be hired by Multicare through its MMA division. Multicare will manage the billing, collection and setting of fees for services provided at the proposed ASC. The MMA physicians maintain offices in various Multicare clinics.

1.5 The business affairs of MMA are managed by its Executive Committee (Committee) comprised primarily of MMA physicians. In 2005, the Committee had eight MMA physicians and one non-physician mid-level MMA provider. Pursuant to its bylaws, the Committee is accountable to MMA physicians; the Committee must solicit input from MMA physicians; the Committee must report action to MMA physicians; and the Committee shall act under the authority delegated to it by Multicare's chief executive officer (CEO).

CONCLUSIONS OF LAW

Summary Judgment

2.1 Summary judgment is appropriate where there is no genuine issue of material fact, and the moving party is entitled to summary judgment as a matter of law. CR 56(c); *State Farm General Ins. Co. v. Emerson*, 102 Wn.2d 477 (1984). In determining whether a genuine issue of material fact exists, all reasonable inferences shall be viewed in the light most favorable to the nonmoving party. *Id.* A motion for summary judgment should only be granted as a matter of law when reasonable minds can reach only one conclusion. *GO2NET, Inc. v. C I Host, Inc.*, 115 Wn.App. 73 (2003).

⁴ Under the Medicare program, Multicare will operate the ASC as a licensed outpatient department of Multicare's Tacoma General and Allenmore Hospitals that operate under one hospital license.

Since no material facts are at issue, Franciscan is entitled to summary judgment as a matter of law.

Ambulatory Surgical Centers

2.2 Ambulatory surgical centers (ASCs) are health care facilities⁵ subject to CN approval. RCW 70.38.105(4)(a) and RCW 70.38.025(6). WAC 246-310-010 defines an ASC as any free-standing entity “that operates primarily for the purpose of performing surgical procedures to treat patients not requiring hospitalization.”

WAC 246-310-010 also contains the following exemption in the CN review process:

This term (ASC) does not include a facility in the offices of private physicians or dentists, whether for individual or group practice, if the privilege of using such facility is not extended to physicians or dentists outside the individual or group practice.

WAC.246-310-010 (emphasis added.)

This regulation exempts “group practice” of “private physicians,” but fails to define these terms. These two key phrases are not defined in CN law or interpreted in Washington case law.

1996 Amendment to WAC 246-310-010

2.3 Prior to 1996, hospital-licensed outpatient surgery centers, located on or off the hospital campus, did not fall within the definition of an “ambulatory surgical facility” under WAC 246-310-010. Therefore, hospitals did not need to acquire a CN before establishing an outpatient surgery center (department) on or off campus.

⁵ WAC 246-310-010 definition of “health care facility” includes free standing ambulatory surgical centers.

WAC 246-310-010 was amended in 1996 to include hospital off-campus outpatient surgery centers.⁶ The regulation was amended to level the playing field. The former regulatory language provided hospitals with an unfair competitive advantage over non-hospital ambulatory surgery facilities because hospital outpatient surgery centers were not subject to CN review. Program agrees with this regulatory history, but asserts that Multicare's proposed ASC is an exempt "group practice" because it is "closed" to hospital's full-time employed physicians and is not open to physicians who merely hold hospital privileges. The WAC 246-310-010 amendment makes it clear that hospital off-campus ASCs are subject to CN review, but does not resolve the issue: Are MMA physicians who may treat patients at the Gig Harbor ASC a "group practice" of "private physicians"? To answer this question, one must consider the plain meaning of the words within its regulatory and statutory context.

"Private Physicians"

2.4 Are MMA physicians who are employed by the Multicare Corporation a "group practice" of "private physicians" within the meaning of the WAC 246-310-010 exception? The term "private" is not defined in CN law, and therefore, the ordinary meaning applies. *City of Seattle v. Williams*, 128 Wn2d 341 (1995). The pertinent ordinary meanings of "private" provided in Webster's II New Riverside University

Dictionary are:

⁶ Prior to 1996, WAC 246-310-010 defined an ASC as a "facility" not a part of a hospital, providing surgical treatment to patients not requiring inpatient care in a hospital. This term does not include a facility in the office of private physicians or dentists, whether for individual or group practice, if the privilege of using such facility is not extended to physicians or dentists outside the individual or group practice."

3. Not available for public use, control or participation <a private dining room> 4. Belong to a specific person or persons <private industry> 5. Not in an official or public position <a private citizen>

Multicare owns and operates three hospitals, 20 clinics, six urgent care facilities, and provides other health care services. The MMA physicians fall within a corporate division overseen by Multicare. Multicare does not "belong to a specific person or persons"⁷ as required by the ordinary meaning of "private." The physicians are employees not owners of the facility or employees of a closely held corporation owned by the physicians practicing in the "group practice." The MMA physicians are not in control of the facilities operation without the corporate oversight and ultimate control.⁸ Multicare argues that its corporate oversight of the MMA physicians does not diminish the physicians' "private" character under the "group practice" exemption because Multicare operates private hospitals/clinics and the physicians' salaries are not paid through public funding sources but through patient's payment for services (including third party payers and Medicare/Medicaid payments on behalf of patients). The non-public nature

⁷ RCW 70.38.025(10) definition of "person" includes "an individual, a trust or estate, a partnership, a corporation (including associations, joint stock companies, and insurance companies), the state, or a political subdivision or instrumentality of the state, including a municipal corporation or a hospital district." The application of this broad definition of person to the dictionary definition's use of person in defining "private" would be illogical. RCW 70.38.025(10) definition of "person" includes the state and other public entities. Such a broad definition of person within the common definition of "private" would clearly be illogical since the "private" dictionary (ordinary meaning) definition excludes public entities; "not available for public use" and "not a public position." It would be illogical to include public entities in the common meaning definition of "private physicians," because it is clearly inconsistent with the intent and scope of the ASC exemption as outlined in WAC 246-310-010.

⁸ Under MMA's bylaws, the MMA Executive Committee is accountable to MMA physicians and must solicit their input, but the committee may only act under the authority delegated to it by Multicare's CEO. Therefore, the Multicare CEO maintains the ultimate control over the MMA business affairs. This corporate authority through the CEO prevents MMA physicians from being "private physicians" under RCW 70.38.025.

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of Multicare's hospitals does not make its corporate employees a group of "private physicians" in this regulatory and statutory context.

Regulatory and Statutory Context

2.5 Since the language of WAC 246-310-010 itself does not provide a clear answer to the meaning of "group practice" of "private physicians," the language is ambiguous. If the regulatory language is susceptible to more than one reasonable meaning within its statutory and regulatory context, it is ambiguous and the courts resort to construction aids. *State v. J.P.*, 149 Wn.2d 444, 450 (2003). The primary goal of statutory interpretation is to ascertain and give effect to the legislature's intent and purpose. *Labor & Industries v. Gongyin*, 154 Wn.2d 38, 44 (2005). Principles of statutory construction may be applied to interpret an ambiguous statute. *State v. J.P.*, 149 Wn.2d at 450. Statutes must be interpreted and construed so that all the language is harmonized, given effect with no portion rendered meaningless or superfluous. *Id.*

2.6 Free-standing ambulatory surgical centers are subject to CN laws. RCW 70.38.105(4)(a); RCW 70.38.025(6). The legislature adopted CN laws so the development of health services and resources would be accomplished in a planned, orderly fashion, consistent with identified priorities and without unnecessary duplication or fragmentation. RCW 70.38.015(2). The legislature adopted the certificate of need program to control costs by ensuring better utilization of existing health care facilities and services. RCW 70.38.015.

2.7 Program implements the certificate of need program and reaches determinations of non-reviewability pursuant to chapter 70.38 RCW and

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chapter 246-310 WAC. Under the CN laws and regulations, Program reviewed Multicare's CN application for a new ASC and determined that a new ASC in Gig Harbor was not needed. Now, the question is whether a "closed" Multicare employed-physicians ASC is exempt from the CN review process. Multicare argues that the plain meaning of "private" should not apply. Multicare claims that "private" is a technical term of art that its expert broadly defines with factors such as the source of payment for the treatment of patients (private pay or through insurance/Medicare on behalf of the patient versus a publicly funded clinic where fees are not collected). Such a board definition of "private" is inconsistent with the CN laws and legislative intent.

2.8 RCW 70.38.111 lists the certificate of need exemptions. In this statute, the legislature did not include an exemption for any type of free-standing ASC. Within this statutory context, it would be reasonable to conclude that the legislature did not intend that regulations be interpreted so broadly that the CN oversight of ASCs would be eroded with large exemptions. Multicare's technical definition is inconsistent with the purpose of the CN laws for a planned and orderly development of health services that avoids unnecessary duplication of services. Multicare's broad definition would create such an enormous exemption in the CN regulation of ASCs, that it would undermine the goals of controlling costs by ensuring better utilization of existing health care facilities and services. RCW 70.38.015. Multicare also relies upon portions of the federal Stark Law and Ohio case law for guidance in its interpretations of "group practice" of "private physicians."

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Stark Law

2.9 Multicare, Program and Franciscan refer to different subsections of the Stark Law in their arguments regarding the definition of "group practice" in WAC 246-310-010.⁹ The Stark Law¹⁰ is a federal regulation that prohibits self-referrals in the Medicare system. The two Stark Law subsections in question state

(a) Single legal entity. The group practice must consist of a single legal entity operating primarily for the purpose of being a physician group practice in any organization form recognized by the State in which the group practice achieves its legal status, including, but not limited to, a partnership, professional corporation, limited liability company, foundation, not-for-profit corporation, faculty practice plan, or similar association....

....
(c) Range of care. Each physician who is a member of the group... must furnish substantially the full range of patient care services that the physician routinely furnishes, including medical care, consultation, diagnosis, and treatment, through the joint use of shared office space, facilities, equipment, and personnel.

42 CFR 411.352(a) and (c) (Emphasis added.)

There is no dispute as to subsection (c); that the MMA physicians will furnish this scope of patient care services. The dispute arises under subsection (a). There is one legal entity in the case at hand, Multicare's non-profit corporation. MMA and Multicare hospitals are divisions under the Multicare corporate umbrella, and the divisions are not

⁹ Janis Sigman's 10/4/06 deposition at 222-224 and the June 2006 DNR letter state that Program looks to other sources for a definition of "group practice," and states that subsection (c) is consistent with the "common understanding of what constitutes a group practice."

¹⁰ Pursuant to WAC 246-310-050 a person may submit a written request to Program for a DNR, a determination of "whether an action the person is considering" is subject to the CN requirements under chapter 246-3130. Program's written response "shall state the reasons for its determination that the action is or is not subject to the certificate of need requirements." WAC 246-310-050(3). The party challenging the DNR bears the burden of showing that Program's decision is incorrect. The burden of proof is a preponderance of the evidence. WAC 246-10-606. Franciscan argues that Program solely relied upon the Stark Law for the definition of "group practice" and therefore is precluded from providing other legal reasons for its DNR. In light of this order's ruling, it is not necessary to address this issue.

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separate legal entities. Multicare's primary purpose is to provide hospital care; Multicare is not "operating primarily for the purpose of being a physician group practice." Comments to the Stark rules produced by the Center for Medicare and Medicaid Services (CMS) provide further guidance on the definition of "group practice" under the Stark Law:

We want to iterate, however, that an entity that has a substantial purpose other than operating a physician group practice, such as operation a hospital, will not qualify. Thus, hospitals that employ two or more physicians are not physicians "group practices" for purposes of (the Stark Law)....

69 Federal Register at 16077. (Emphasis added).

2.10 The Stark Law as a whole does not support an exemption of Multicare's proposed facility, because the group practice is not of a single legal entity that operates primarily for the purpose of being a physician group. The Stark Law may be used as guidance but is not controlling since the regulation's focus is controlling the Medicare payments of self referral services rather than the development of Washington State's health services/resources in a planned, orderly fashion, and without unnecessary duplication or fragmentation. RCW 70.38.015. On the other hand, one of the goals in both the federal Medicare and state CN laws is an attempt to control unnecessary increase in health care costs; therefore, its language does not support a finding of a "group practice" exemption in the case at hand. In addition to the Stark Law, Multicare and Program cite an Ohio case for guidance in the interpretation of "group practice" of "private physicians."

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Founder's Women's Health Center v. Ohio State Dept of Health

2.11 *Founder's Women's Health Center v. Ohio State Dept of Health* (Ohio App. 10 Dist. 2002) is a non-binding, unpublished out-of-state case that addresses similar issues but is not directly on point.¹¹ The Ohio court held that an abortion clinic owned by one physician did not qualify for the Ohio licensing exemption for an ambulatory surgical facility. The court considered various factors including the facility's ownership and whether physicians were treating their own patients. The court relied in part on dicta of one of its prior decisions that found the definition of "private physician's office" under Ohio's CN regulatory, turned in part, on the primary purpose of a medical facility. In other words, would the Multicare health facility's primary purpose be the non-surgical care provided by MMA physicians to their own patients or would it be out-patient surgery provided through the ASC? Even though the answer is yes, one major question remains unanswered by these Ohio cases. These cases involved physician ownership, and as a result, the court did not address the question of a large non-physician corporation or hospital owning and operating the facility in question. Therefore, the *Founder's* case does not help resolve the question at hand.

Conclusion

2.12 A court will not construe a statute to render it meaningless.

State v. Cromwell, 157 Wn2d 529 (2006). In construing a statute, one must give effect to the legislative intent and purpose. *Id.* Multicare and Program define "group practice"

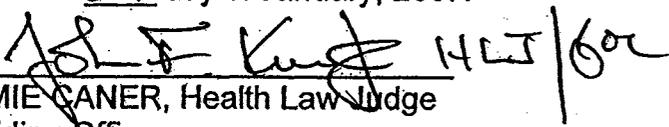
¹¹ The *Founder's* court addressed Ohio regulatory language that exempted licensing ASC facilities that are located in the "offices of private physicians." The court held that "legal ownership" of the facility by one physician was only one factor in determining whether the exemption applies.

of "private physicians" too broadly, and essentially renders the term "private" as meaningless. The common meaning of "private" within the CN regulatory context does not include this type of corporate employed physician. Within this context, private physicians or private practice physicians are those who practice privately, as physicians separate from a large non-physician health care entity. The "group practice" exemption to the CN regulation was intended to assist the private practice physician for the treatment of their own patients in their own offices. An interpretation of WAC 246-310-010 that would permit large, non-physician health care entities to utilize the exemption, would create an enormous exemption for hospitals or other non-physician corporations that would defeat the very purpose of the CN law of ambulatory surgical centers.

ORDER

Franciscan's motion for summary judgment is GRANTED, and Multicare's and the Program's motions for summary judgment are DENIED.

Dated this 29th day of January, 2007.


ZIMMIE CANER, Health Law Judge
Presiding Officer

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NOTICE TO PARTIES

This order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate/national reporting requirements. If adverse action is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

Either party may file a **petition for reconsideration**. RCW 34.05.461(3); RCW 34.05.470. The petition must be filed within 10 days of service of this Order with:

The Adjudicative Service Unit
P.O. Box 47879
Olympia, Washington 98504-7879

and a copy must be sent to:

Certificate of Need Program
P.O. Box 47852
Olympia, Washington 98504-7852

The request must state the specific grounds upon which reconsideration is requested and the relief requested. The petition for reconsideration is considered denied 20 days after the petition is filed if the Adjudicative Service Unit has not responded to the petition or served written notice of the date by which action will be taken on the petition.

A petition for judicial review must be filed and served within 30 days after service of this Order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V., Judicial Review and Civil Enforcement. If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. RCW 34.05.470(3).

The Order remains in effect even if a petition for reconsideration or petition for review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. RCW 34.05.010(6). This Order was "served" upon you on the day it was deposited in the United States mail. RCW 34.05.010(19).

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