

**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)	Docket No. 06-07-C-2001CN
GIG HARBOR AMBULATORY)	
SURGERY CENTER,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW AND
FRANCISCAN HEALTH SYSTEM,)	ORDER GRANTING
)	SUMMARY JUDGMENT
Petitioner.)	
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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?

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER GRANTING
SUMMARY JUDGMENT

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

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.

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

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."

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.

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."

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.

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).