

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

In the Matter of:

THE EVERETT CLINIC,

Petitioners.

Master Case Nos. M2017-741 (Lead)
M2017-348

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND INITIAL ORDER

APPEARANCES:

Petitioners, The Everett Clinic, by
Hall, Render, Killian, Heath & Lyman PC, per
Emily R. Studebaker; Sevilla P. Rhoads; and Stephen Rose, Attorneys at Law

Department of Health Certificate of Need Program (Program), by
Office of the Attorney General, per
Janis Snoey, Assistant Attorney General

PRESIDING OFFICER: Laura L. Farris, Senior Presiding Officer

Any entity wanting to know whether an action it is considering is subject to Certificate of Need requirements may submit a written request to the Department of Health's Certificate of Need Program requesting a formal determination of applicability. WAC 246-310-050. The Everett Clinic did this and sought an exemption from Certificate of Need requirements for an ambulatory surgical center in Edmonds, Washington. No hearing was held in this case. Rather, the Presiding Officer heard argument by brief, pursuant to a stipulation of the parties.

I. ISSUE

Does the Everett Clinic's proposed ambulatory surgical facility site in Edmonds, Washington qualify for an exemption from the Certificate of Need requirement under WAC 246-310-010(5)?

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II. SUMMARY OF PROCEEDINGS

There was no testimony taken in this matter. The Presiding Officer admitted the following exhibit and findings of fact pursuant to stipulation of the parties. See Parties Joint Statement of Facts.

Joint Exhibit.

Exhibit P-1: Program's Application Record (PAR) (Bates 000001-01000).

References to the application record are designated "PAR" and the Bates page number.

III. FINDINGS OF FACT

1.1 The Presiding Officer adopted the Parties' Joint Statement of Facts and made additional findings.

A. Joint Statement of Facts

The Everett Clinic (TEC) is a group medical practice employing approximately 400 physicians and 165 advance care providers who serve about 322,000 patients a year. PAR at 886-87 (The Everett Clinic website); see also PAR at 688.¹ The Everett Clinic has 27 practice sites in Snohomish, Island, and King County. PAR at 12-14, 696-98. With the exception of contracted radiologists or temporary substitutions (otherwise known as Locums Tenans), The Everett Clinic employs all physicians and advance care providers who provide services on behalf of The Everett Clinic. PAR at 822, 833.

¹ To increase readability, the Presiding Officer provides actual names rather than the abbreviations provided.

1.2 The Everett Clinic is organized under a professional limited liability company agreement (LLC Agreement). PAR at 630-44 (duplicate at PAR at 17-32 (see correction for missing page 19 at PAR at 577), PAR at 703-16).

1.3 DaVita Everett Physicians, PS is the 100 percent owner of The Everett Clinic. See PAR at 667-670, 688, 692. Shawn L. Slack, M.D. is the sole shareholder in DaVita Everett Physicians. See PAR at 688-89, 692.

1.4 The Everett Clinic contracts with the Everett MSO, Inc. (the Everett MSO), under an Administrative Services Agreement. PAR at 734-63. Everett MSO is a subsidiary of DaVita HealthCare Partners, Inc. See PAR at 912-13, 602-621, 823.

1.5 On December 31, 2015, The Everett Clinic submitted an application requesting a determination that the existing Kemp Ambulatory Surgical Center did not need a Certificate of Need. The application cover letter stated that The Everett Clinic would be converting from a professional services corporation (PS) to a professional limited liability corporation (PLLC), entering into series of transactions with DaVita to reorganize and recapitalize The Everett Clinic, and entering into an Administrative Services Agreement with Everett MSO. PAR at 912-13; Program's entire application record for the KEMP Ambulatory Surgical Center PAR at 88-1000.

1.6 On February 29, 2016, the Program issued Determination of Reviewability (DOR) 16-18 for the Kemp Ambulatory Surgical Center in which the Program concluded that Kemp Ambulatory Surgical Center was exempt from Certificate of Need review. PAR at 890-92.

1.7 In the period from February 29, 2016 to March 1, 2016, DaVita and The Everett Clinic completed a series of transactions as follows: (1) The Everett Clinic Medical Group acquired certain assets from The Everett Clinic (including real property), entered into the Administrative Services Agreement with The Everett Clinic, hired some of The Everett Clinics administrative staff, The Everett Center Medical Group became a subsidiary of DaVita Healthcare Partners via a merger, and The Everett Center Medical Group reformed as Everett MSO; and (2) DaVita Everett Physicians acquired certain of The Everett Clinic's assets, physician employees, and medical practice, through a merger between The Everett Clinic and a subsidiary of DaVita Everett Physicians. See PAR at 585-678; 823, paragraphs 9, 10, and 11.

1.8 On September 15, 2016, the Program received The Everett Clinic's 17-07 Certificate of Need exemption application for a proposed ambulatory surgical center at The Everett Clinic's Edmonds site. At the time of the application, DaVita Everett Physicians was the 100 percent owner of The Everett Clinic and Tyler Jung, M.D., was the sole shareholder of DaVita Everett Physicians. PAR at 6-37.

1.9 The Edmonds Ambulatory Surgical Center proposal includes:

- a. Proposed procedures: cataracts, blepharoplasty, knee arthroscopy, shoulder arthroscopy, sinus surgery, tonsils and adenoids, myringotomy, epidural steroid injections, carpal tunnel, bunionectomy, cystoscopy, hysteroscopy (D&C), laparoscopic cholecystectomy, inguinal hernia repair, and ventral hernia repair. PAR at 67 (DOR 17-07), 727 at (DOR 17-17).
- b. Eighty physicians or advanced care providers, all employed by The Everett Clinic, would have access to the proposed surgery center. PAR at 33-35 (DOR 17-07). PAR at 717-20 (DOR 17-17).

1.10 The Program concluded that because DaVita owned The Everett Clinic through one of the DaVita subsidiaries, the Edmonds Ambulatory Surgical Center would not be in the offices of private physicians in a group practice and therefore did not qualify for an exemption. PAR at 1-5. The Everett Clinic timely appealed.

1.11 On March 24, 2017, the Program received The Everett Clinic's 17-17 Certificate of Need exemption application for the Edmonds Ambulatory Surgical Center. The proposed facility was the same as for DOR 17-07. Dr. Slack was now the sole shareholder of DaVita Everett Physicians. PAR at 688-727.

1.12 On June 29, 2017, the Program withdrew DOR 17-07 after concluding that DaVita did not own The Everett Clinic. PAR at 578-678.

1.13 Pursuant to the parties' Stipulated Joint Motion for Consolidation and Expedited Decision, filed July 13, 2017, The Everett Clinic submitted all documentation to the Certificate of Need Program for consideration in the matter of both applications, DOR 17-07 and 17-17, on July 19, 2017. See PAR at 820-880.

1.14 On July 24, 2017, the Certificate of Need Program issued DOR 17-17 and DOR 17-07, concluding that the Edmonds Ambulatory Surgical Center is not exempt from the requirement to obtain a Certificate of Need. PAR at 679-87.

B. Additional Findings

1.15 A Certificate of Need is a written authorization by the Certificate of Need Program for a person to implement a proposal for one or more undertakings. WAC 246-310-010(11). A Certificate of Need is required for the construction, development, or other establishment of a new health care facility.

RCW 70.38.105(4)(a); see also WAC 246-310-010(1)(a). An ambulatory surgical center is a health care facility. RCW 70.38.025(6).

1.16 DaVita HealthCare Partner, Inc. (DaVita) is a Fortune 500 company that operates and manages medical groups and affiliated physician networks in six states: Colorado, California, Florida, Nevada, New Mexico, Pennsylvania, and Washington. PAR at 885. It is registered with the New York Stock Exchange. PAR at 167. The larger company owns kidney dialysis centers nationally.

1.17 The proposed Edmunds ambulatory surgery site would be located in the existing Everett Clinic at the Edmonds practice site at 21401 72nd Ave., West, Edmonds, Washington 98026. PAR 000003). Previously, an ambulatory surgery center operated at this site but currently there is no approval for such a site.

C. Management

1.18 The Everett Clinic converted from a professional services corporation to a limited liability company. See the Limited Liability Company Agreement (LLC Agreement) PAR 631-636. The LLC Agreement absorbs The Everett Clinic's contractual partner Everett MSO. While the LLC delegates clinical decision-making to The Everett's Clinic's Clinical Leadership Board and final authority in all matters to Dr. Slack, the LLC Agreement sets-up a joint working arrangement. Everett MSO advises on opening and closing of medical offices and any significant changes in operations; patient safety; leadership development; promoting workplace goals; clinical quality; patient experience; clinical satisfaction; and reviewing, evaluating, and approving The Everett Clinic's and The Everett MSO's corporate performance,

including the award of bonuses to The Everett MSO and approves The Everett Clinic's budgets.

1.19 The considerable degree of integration is even more apparent in their Administrative Service Agreement.² Under the Administrative Services agreement, the Everett MSO employs all nursing staff and non-clinical support personnel. PAR at 736, 744. Everett MSO controls and owns the supplies,³ the equipment, including reasonably necessary medical equipment, furniture, improvements, computer hardware, and software necessary for operation. In and of itself this might be a vendor relationship-except that Everett MSO decides what is necessary for the operation, not The Everett Clinic. Everett MSO negotiates rates for and procures all medical and office space (subject to Dr. Slack's approval) and is expressly authorized to negotiate, execute, and contract for legal, accounting, marketing, and all goods and services.

1.20 In short, Everett MSO is the office. The Everett Clinic is deeply entangled with and dependent upon it.

V. CONCLUSIONS OF LAW

2.1 The Department of Health is authorized and directed to implement the Certificate of Need program. RCW 70.38.105(1). Admissible evidence in Certificate of Need hearings is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. RCW 34.05.452(1). The standard of proof is preponderance of the evidence. WAC 246-10-606.

² The Administrative Service Agreement is redacted by The Everett Group. The redactions do not appear to be in an area critical to this decision.

³ This includes medical supplies (including pharmaceuticals after consultation with The Everett Clinic and in accordance with state and federal law. PAR 742

2.2 The Presiding Officer (on delegated authority from the Secretary of Health) is the agency's fact finder and decision maker. *DaVita v. Department of Health*, 137 Wn. App. 174, 182 (2007). The Presiding Officer engages in a *de novo* review of the record. See, *University of Washington Medical Center v. Department of Health*, 164 Wn.2d 95 (2008). The Presiding Officer may consider the Program's written analysis in reaching her decision but is not required to defer to the Program analyst's decision or expertise. *DaVita v. Department of Health*, 137 Wn. App. at 182-183.

2.3 In acting as the Department's decision-maker, the Presiding Officer reviewed the application record, the admitted exhibits, and the closing briefs submitted by the parties pursuant to RCW 34.05.461(7).

Ambulatory Surgical Facility and Exemption

2.4 RCW 70.38.105 requires ambulatory surgical facilities to obtain a Certificate of Need. RCW 70.38.025(6) includes "ambulatory surgical facilities" in the definition of health care facilities. There is no dispute that the proposed Edmunds facility is an ambulatory surgical facility.

2.5 As stated above, the issue in this case is whether the ambulatory surgery center that The Everett Clinic proposes to construct at its Edmonds site is exempt from this Certificate of Need requirement because it meets the exception set forth in WAC 246-310-010(5). WAC 246-310-010(5) reads:

"ambulatory surgical facility" means any free-standing facility, 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 outside the individual or **group practice**. (Emphasis added)

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

2.6 In *Providence Physician Services Co. v. Washington State Department of Health* 96 Wash. App. 709 (2016), the Court of Appeals construed the exemption above to cover a facility in the office of private physicians or dentists, whether for individual or group practice, [as long as] the privilege of using the facility is not extended to physicians or dentists outside the practice. WAC 246-310-010(5). Thus, the “private physicians” must be organized for individual or group practice.

The *Providence* Court held that the definition above reasonably implies to a private practice. The *Providence Court* held that the term “private practice” is not defined. *Providence* at 716. We may use a dictionary to discern the plain meaning of an undefined statutory term. *Nissen v. Pierce County* 183 Wn.2d 863, 881m 357 P.3d 45 (2015). The *Providence* Court used the Merriam Webster On-line Dictionary to define private practice. *Providence* at 716. That is, “private practice,” is the “practice of a profession (as medicine) independently and not as an employee.” <http://merriam-webster.com> (last accessed September 2017). Here, the Everett Clinic does not practices medicine independently. *Providence* *ibid*. These are independent practices. Here, the physicians doing the surgeries do not own their practice. Dr. Slack does. Unlike an independent practice, the physicians’ have also given away essential authority: the Everett MSO has authority to manage clinical staff; make recommendations for bonuses; employ nursing staff; contract for legal,

accounting, and marketing services; negotiate rates for and procures all medical and office space (subject to approval); and determine what medical equipment is needed.⁴

The Department has litigated the meaning of the private office exemption also in an administrative proceeding: *Multicare Health Systems Gig Harbor Ambulatory Surgery Center* (Multicare ASC).⁵ In this case, Multicare sought to qualify for the Ambulatory Surgical Center exemption of its Multicare Medical Associates. Multicare Medical Associates, like The Everett Center, was subject to Multicare's corporate control, including the managing of Multicare's billing, collection, and setting of fees. Multicare would hire the physicians through Multicare Medical Associates. Multicare ASC held that:

[t]he 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 (the ASF exemption) 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 laws of ambulatory surgical centers.

Providence at 716

Multicare ASC bolsters Providence and discusses why the Department must interpret its rules as consistent with the general purpose of the Certificate of Need

⁴ Although the Everett Clinic analogizes the Everett MSO to a vendor relationship, it is apples and oranges. A vendor has a very limited scope of authority.

⁵ Noted at 147 Wn. App. 1024 (2008). The Providence Court notes that Multicare is still good law even though it vacated the decision on lack of jurisdiction.

Program. "A central purpose of the Certificate of Need Program is to control health care costs by ensuring better utilization of existing medical services and limiting the expansion of new medical services. See RCW 70.380.015. "These policies would be eviscerated under The Everett Clinic's theory. A health care company that sought to establish an ambulatory surgical center could circumvent the Certificate of Need requirement merely by taking control of a private practice. By repeating this scenario, health care facilities could "balloon" the number of ambulatory surgical centers in Washington and undermine the cost control measures of the Certificate of Need Program through the guise of a pseudo-subsiary that is otherwise under the control of the health care facility. Such an interpretation of the rule would emasculate it.

Based on the above Findings of Fact and Conclusions of Law, the Presiding Officer determines that because DaVita controls TEC through one of the DaVita subsidiaries, the Edmonds ASC would not be in the offices of private physicians in a group practice, and therefore, did not qualify for an exemption.

Rulemaking/Arbitrary & Capricious

The Everett Clinic argues that the Department engaged in rule-making because its interpretation of the ASC exemption contradicts the Certificate of Need Program's decision with regard to the Kemp Ambulatory Surgical Center. As noted by the *Providence* Court, the decisions in this area have been inconsistent. *Providence* *ibid.* However, both *Providence* and *Multicare* stand for the proposition that a corporate controlled entity is not within the private practice exemption.

Even assuming that the Certificate of Need Program was inconsistent in its prior decision, they were made by administrators making decisions on an ad hoc bases. With regard to the Kemp Ambulatory Surgical Center, more was known about the Edmonds Ambulatory Surgical Center (regarding the interconnectedness with The Everett MSO) when the Program made the Edmonds decision. Also, these initial decisions are not binding on the Department. See *DaVita v. Department of Health*, 137 Wn. App. at 181-84. With statutory construction, one is not required to make an error again.

VI. ORDER

Based on the foregoing Procedural History and Finding of Fact, and Conclusions of Law, the Edmonds Ambulatory Surgical Center is NOT EXEMPT from the requirement to obtain a Certificate of Need.

Dated this 19 day of September, 2017.

/s/

LAURA L. FARRIS, Senior Presiding Officer
Presiding Officer

NOTICE TO PARTIES

When signed by the presiding officer, this order shall be considered an initial order. RCW 18.130.095(4); Chapter 109, law of 2013 (Sec. 3); WAC 246-10-608.

Any party may file a written petition for administrative review of this initial order stating the specific grounds upon which exception is taken and the relief requested.

WAC 246-10-701(1). A petition for administrative review must be served upon the opposing party and filed with the adjudicative clerk office within 21 days of service of the initial order. WAC 246-10-701(3).

"Filed" means actual receipt of the document by the Adjudicative Clerk Office. RCW 34.05.010(6). "Served" means the day the document was deposited in the United States mail. RCW 34.05.010(19). The petition for administrative review must be filed within twenty-one (21) calendar days of service of the initial order with:

Adjudicative Clerk Office
Adjudicative Service Unit
PO Box 47879
Olympia, WA 98504-7879

and a copy must be sent to the opposing party. If the opposing party is represented by counsel, the copy should be sent to the attorney. If sending a copy to the Assistant Attorney General in this case, the mailing address is:

Agriculture and Health Division
Office of the Attorney General
PO Box 40109
Olympia, WA 98504-0109

Effective date: If administrative review is not timely requested as provided above, this initial order becomes a final order and takes effect, under WAC 246-10-701(5), at 5:00 pm on _____. Failure to petition for administrative review may result in the inability to obtain judicial review due to failure to exhaust administrative remedies. RCW 34.05.534.

Final orders will be reported as provided by law. Initial and Final orders will be placed on the Department of Health's website, and otherwise disseminated as required by the Public Records Act (Chap. 42.56 RCW). All orders are public documents and may be released.

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