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MEMORANDUM

DATE: June 25, 2010

TO: Holly Mercer, Executive Director

FROM: Thomas W. Cowan, Senior Assistant Attorney General
Business Activities Section

Chelsie Adams, Law Clerk
Business Activities Section

SUBJECT: Pearl Health Center, PC
DOJ File Number: 851001-GB0406-10



This memorandum responds to a complaint received by the Oregon Medical Board and referred to the Board of Nursing alleging the violation of ORS 58.375 by a nurse practitioner. The following summarizes my research on ORS 58.375 and the requirements for a professional corporation majority owned by a nurse practitioner.

In summary, the term "practicing medicine" in ORS 58.375 has the same meaning found in ORS 677.085 and, thus, does not apply to nurse practitioners. If ORS 58.375 did apply to nurse practitioners, it would lead to the absurd result of subjecting nurse practitioners to the authority of the Board of Medical Examiners. Since the Board of Nursing has not promulgated any standards regarding business organizations for nurse practitioners, a nurse practitioner who has complied with the professional corporation requirements in Chapter 58 is legally able to own and operate a clinic under the organization of a professional corporation.

ORS 58.375.

The repeal of ORS 58.108 eliminated the requirement that professionals hold a majority of the stock of a professional corporation, and that the officers and directors of a professional corporation be professionals. 1997 Or Laws ch 774, §31, repealed ORS 58.108. However, this

requirement remains in place for professional corporations engaged in practicing medicine. ORS 58.375.1.¹ This raises the question of whether a nurse practitioner is engaged in “practicing medicine” under the statute, and, thus, held to the majority physician requirement. In order to determine whether nurse practitioners are included within the meaning of ORS 58.375, we must look to the legislative intent using the analytical framework given in *PGE v. Bureau of Labor & Indus.*, 317 Or. 606 (1993), as modified by *State v. Gaines*, 346 Or. 160 (2009).

In the first step of the *PGE* analysis, we look at the text of the statute and its context. *PGE*, 317 Or at 610. Context includes other provisions in the same statute, such as statutory definitions. *State v. Couch*, 341 Or 610, 617–618 (2006). In the Chapter 58 definitions section, the legislature gives the term “practicing medicine” the same meaning it has under ORS 677.085. ORS 58.015(4). Accordingly, we turn to ORS 677.085, which lists activities that constitute the practice of medicine. Examples include advertising ones ability to practice medicine, prescribing medicine, performing any surgical operation, and offering to diagnose or treat illness. ORS 677.085(1)-(4). Therefore, a nurse practitioner engaged in any of these activities is practicing medicine within the meaning of this statute and, thus, held to the majority physician requirement.

However, put in context, the statute reveals that nursing is outside of the scope of Chapter 677. ORS 677.060(6). “This chapter does not affect or prevent the following: [t]he practice of *** nursing, *** by any person authorized by this state.” *Id.* Since a nurse practitioner is “a registered nurse who has been certified by the board as qualified to practice in an expanded specialty role within the practice of nursing,” nurse practitioners are included within the meaning of this exemption. ORS 678.101. Thus, a nurse practitioner engaged in activities listed under ORS 677.085 is not engaged in the practice of medicine. This interpretation is consistent with case law. *See Sutton v. Cook*, 254 Or. 116, 119-120 (1969) (Statute regulating the practice of medicine by physicians does not apply to persons practicing the other healing arts and the fact that the diagnosis or treatment of a fracture constituted the practice of medicine does not make unlawful diagnosis or treatment of fracture by a chiropractor).

In applying this interpretation to ORS 58.375, we must rely on rules of construction to place the interpretation in context. Since courts assume the legislature intended statutes to comprise a workable whole, we must construe a statute in a manner that gives effect to related statutes. *PGE*, 317 Or. at 610–611. See ORS 174.010 (“In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained

¹ ORS 58.375(1)(a)-(e) provides as follows:

In a professional corporation organized for the purpose of practicing medicine:

- (a) The holders of the majority of each class of shares entitled to vote shall be physicians who are licensed in this state to practice medicine.
- (b) A majority of the directors shall be physicians who are licensed in this state to practice medicine.
- (c) All officers except the secretary and treasurer, if any, must be physicians who are licensed in this state to practice medicine. Any two or more offices may be held by the same person.
- (d) Except as otherwise provided by law, the Oregon Medical Board may expressly require that more than a majority of each class of shares entitled to vote be held by physicians who are licensed in this state to practice medicine.
- (e) Except as otherwise provided by law, the Oregon Medical Board may expressly require that more than a majority of the directors be physicians who are licensed in this state to practice medicine.

therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”). Thus, the term practicing medicine in ORS 58.375 has the same meaning found in ORS 677.085 and does not apply to nurse practitioners.

Furthermore, professional corporations organized to practice medicine are subject to the authority of Board of Medical Examiners. ORS 58.379. The Medical Board lacks statutory authority over nurse practitioners. ORS 677.265. Including nurse practitioners within the meaning of ORS 58.375 would lead to the absurd result of subjecting nurse practitioners to the authority of the Medical Board. As such, it is at odds with the axiom of statutory construction that statutes in conflict, if at all possible, should be construed so they may exist in harmony. *McLain v. Lafferty*, 257 Or 553, 558 (1971) (“It is, of course, a cardinal rule of statutory construction that when it is contended that two statutes are in conflict, the statutes, must, whenever possible, be construed together and in such a manner as to be consistent, rather than in conflict, thus giving effect to both statutes.”) For these reasons, it is unlikely that the legislature intended to include nurse practitioners within the meaning of ORS 58.375.

We will now explore the requirements for a professional corporation as it applies to nurse practitioners.

Professional Corporations.

A professional corporation or a domestic professional corporation is “a corporation organized under [Chapter 58] for the specific purpose of rendering professional service or services and for such other purposes provided under this chapter.” ORS 58.015(6). Professional service means “personal service or services rendered in this state to the public which may be lawfully rendered only pursuant to a license by a professional.” ORS 58.015(7). The term professional includes licensed nurse practitioners. ORS 58.015(5)(h).

Nurse practitioners are legally able to practice independently. “The nurse practitioner is independently responsible and accountable for the continuous and comprehensive management of a broad range of health care ***.” OAR 851-050-0005(5). This is consistent with Workers Compensation Health Benefits statutes. “Authorized nurse practitioners *** need not be working under a written treatment plan ***, nor under the direct control and supervision of the attending physician.” OAR 436-010-0210(5). In fact, all of the professions listed may legally practice independently. ORS 58.015(5)(a)-(m). Therefore, given a nurse practitioners independent professional status, it seems incongruent to require a nurse practitioner to conform to the majority physician requirement in ORS 58.375.

Finally, ORS 58.367 permits regulatory boards to impose additional rules and regulations for their licensees. The Board of Nursing has not promulgated any standards regarding business organizations for nurse practitioners. Therefore, in the absence of further requirements, a nurse practitioner who has complied with the professional corporation requirements in Chapter 58 is legally able to own and operate a clinic under the organization of a professional corporation.