

Kentucky, Cabinet for Health and Family Services and holding that Muhlenberg Medical Properties VI, LLC qualified for an exemption under Kentucky Revised Statutes (KRS) 216B.020(2)(a) to the certificate of need requirement. We reverse.

Muhlenberg Medical Properties VI, LLC (Muhlenberg Medical) is comprised of six members - five physicians and one nurse practitioner - practicing medicine in the areas of family practice and internal medicine.¹ Muhlenberg Medical requested an advisory opinion from the Cabinet for Health and Family Services, Office of Certificate of Need (Cabinet) regarding whether it “could provide MRI services without a certificate of need pursuant to the exemption from certificate of need provided by KRS 216B.020(2)(a) for the private offices and clinics of physicians” (private office exemption). Essentially, Muhlenberg Medical sought to open a medical facility that performed MRI scans (MRI facility). The physicians of Muhlenberg Medical were not radiologists, so independent radiologists would be contracted to interpret the MRI scans. The physicians of Muhlenberg Medical would continue to see patients at an adjoining facility and only provide “general medical oversight” of the MRI facility. In its request for an advisory opinion, Muhlenberg Medical described its proposed MRI facility as follows:

¹ The six member of Muhlenberg Medical provide medical services through another entity, MS Community Health, LLC (Community Health). Community Health has one member – Muhlenberg Medical Center, LLC (Medical Center). Medical Center is also comprised of six members – the same five physicians who comprised Muhlenberg Medical and Thomas Randall Powell, who is the Chief Executive Officer of Muhlenberg Medical.

[Muhlenberg Medical] plans to purchase or lease, and to operate, magnetic resonance imaging equipment as a new imaging service in Powderly. The members of [Muhlenberg Medical] are physicians licensed to practice in Kentucky and a nurse practitioner working in their practice group. [Muhlenberg Medical] plans to provide the new MRI imaging services from an addition to the physicians' current practice space in Powderly. [Muhlenberg Medical] will offer no medical services other than the technical component of the MRI services. The physicians and the nurse practitioner who are members of [Muhlenberg Medical] will practice medicine regularly at [Muhlenberg Medical]'s office facility, which will be immediately adjacent to their existing office space. [Muhlenberg Medical]'s MRI service will be housed in a building owned by another entity controlled by the physicians. [Muhlenberg Medical] will provide, and bill for, the technical component of the MRI service. The physicians will provide general medical oversight of the MRI service. [Muhlenberg Medical] will contract with radiologists not in the physicians' group to read and interpret the MRI images, and the radiologists will bill the patients and their health benefits plans separately for the radiologists' professional services.

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[Muhlenberg Medical] may enter into an arrangement with a local hospital under which hospital inpatients will be brought to [Muhlenberg Medical]'s office for MRI services.

The Cabinet ultimately issued an Advisory Opinion that Muhlenberg Medical did not qualify for the private office exemption of KRS 216B.020(2)(a) and; thus, a certificate of need would be required for the MRI facility. In its Advisory Opinion, the Cabinet opined:

[Muhlenberg Medical] may not provide MRI services without a certificate of need because none of the owners

of [Muhlenberg Medical] will actually practice or provide physician services at [Muhlenberg Medical].

In order to qualify for the exemption from certificate of need provided by KRS 216B.020(2)(a) for the private offices and clinics of physicians . . . the office or clinic claiming exemption must be:

- Solely owned by practitioners of the healing arts; and
- The owners-practitioners must practice at the office or clinic on a regular basis.

Being dissatisfied with the Advisory Opinion, Muhlenberg Medical subsequently requested a hearing before the Cabinet. Following the hearing, a final order was entered December 12, 2005, which affirmed the Advisory Opinion. Therein, the following findings of fact and conclusions of law were made:

4. The [private] office exemption contained in KRS 216B.020(2)(a) states that, “Nothing in this chapter shall be construed to authorize the licensure, supervision, regulation or control in any manner of private offices and clinics of physicians, dentists and other practitioners of the healing arts.”

5. Because the stated purpose of the certificate of need laws is to prevent the proliferation of unnecessary health care facilities, the physicians’ office exemption must be narrowly construed.

6. The [private] office exemption cannot apply to a non-physician owned facility where physicians provide health services. The exemption must apply only where the “office or clinic” is owned by physicians or other practitioners who actually practice there. This is obvious for several reasons.

7. KRS 216B.020(2) is unambiguous and therefore, in applying the facts of this case to the

exemption, one must look to the plain meaning of the statute. The plain meaning of the statutory language mandates only one conclusion. The exemption applies only to “private offices or clinics of physicians, dentists and other practitioners of the healing arts.” “Private” means “belonging to a particular person or group rather than the public.” “Of” means “belonging to.” Taken together this means “offices or clinics belonging solely to physicians, dentists and other practitioners.” Because physicians and dentists are included in the phrase with “other practitioners,” the physicians must also be “practitioners,” and must actively practice in their offices or clinics.

8. There is no question that [Muhlenberg Medical] would be a health facility offering health services.

9. Therefore, the issue before the undersigned is whether the Cabinet correctly concluded in the Advisory Opinion that [Muhlenberg Medical] cannot operate MRI services without a certificate of need. Specifically, it must be determined whether [Muhlenberg Medical] may rely on the [private] office exemption, and thus be allowed to operate without obtaining a certificate of need.

10. After considering all the evidence presented, it must be concluded that [Muhlenberg Medical] does not fall within the [private] office exemption and that the Cabinet’s Advisory Opinion should be affirmed.

11. While the members/owners of [Muhlenberg Medical] are either physicians or practitioners of the healing arts, by [Muhlenberg Medical’s] own admission they are not qualified to read MRI scans. Rather, [Muhlenberg Medical] is proposing to contract with a radiology practice group to read the scans done at [Muhlenberg Medical]. Within the plain meaning of the [private] office exemption, it can not be said that the members/owners of [Muhlenberg Medical] would be actively practice[ing] in their office.

Muhlenberg Medical then filed a Petition for Review from the final order in Franklin Circuit Court. In an Opinion and Order entered August 10, 2007, the circuit court reversed the final order of the Cabinet. Therein, the circuit court specifically concluded:

It is clear that all members of [Muhlenberg Medical] actively practice medicine at the very location where the new MRI equipment is to be operated. Further [Muhlenberg Medical] will employ certified technicians to operate the on-site equipment. Although the MRI scans will be read and evaluated off-site, and patients may receive limited diagnostic care to the radiologists selected by [Muhlenberg Medical], the patients would be sent back to their primary care physician for final diagnosis and treatment.

Because the words of the statute are plain and unambiguous, they must be given their commonly understood meaning. *Stewart v. Estate of Cooper*, 102 S.W.3d 913 (Ky. 2003). Applying, [sic] the commonly understood meaning of the statutory language at issue, this Court finds that [Muhlenberg Medical] is subject to the [private] office exemption because the MRI equipment will be located and operated on the premises where all members of [Muhlenberg Medical] regularly practice medicine.

All members of [Muhlenberg Medical] see patients on the same premises where the MRI is to be located. In fact, although the reading of the images will be contracted out, it is the members of the MRI who will be relying on the images to make final diagnoses and treatment decisions for their patients, whom they see on the same premises. Unlike the question raised in the *Gilbert* case, which involved whether any physicians were practicing in the MRI clinics at issue, this matter involves the purchase of an MRI by a group of physicians for the treatment of their own patients.

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Because [Muhlenberg Medical] qualifies for the [private] office exemption to certificate of need requirements, the Final Order of Respondent Cabinet for Health and Family Services is hereby **REVERSED**, and this matter is remanded to the Cabinet with direction to enter an order consistent with this opinion.

In sum, the circuit court held that Muhlenberg Medical did qualify for the private office exemption of KRS 216B.020(2)(a) and the Cabinet erred by holding otherwise. This appeal follows.

Appellants contend that the circuit court erred by reversing the final order of the Cabinet and by concluding that Muhlenberg Medical qualified for the private office exemption to the certificate of need requirement. For the reasons hereinafter set forth, we are of the opinion that Muhlenberg Medical did not qualify for the private office exemption and that the circuit court erred by concluding that it did.

Judicial review of an administrative agency's decision is concerned with arbitrariness. *Com., Transp. Cabinet v. Weinberg*, 150 S.W.3d 75 (Ky. App. 2004). Arbitrariness has many facets. *Id.* In this appeal, the material facts are undisputed, and we are confronted with a question of law – the proper interpretation and ambit of the private office exemption under KRS 216B.020(2)(a), which reads:

(2) Nothing in this chapter shall be construed to authorize the licensure, supervision, regulation, or control in any manner of:

(a) Private offices and clinics of physicians, dentists, and other practitioners of the healing arts, except any physician's office that meets the criteria set forth in KRS 216B.015(4)[.]

The circuit court viewed the private office exemption contained in KRS 216B.020(2)(a) as broad enough to encompass Muhlenberg Medical's proposed MRI facility. The court's reasoning was simplistic:

[T]his Court finds that [Muhlenberg Medical] is subject to the [private] office exemption because the MRI equipment sought will be located and operated on the premises where all members of [Muhlenberg Medical] regularly practice medicine.

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[I]t is clear that the proposed activity of [Muhlenberg Medical] is entitled to the [private] office exemption because all the members of [Muhlenberg Medical] are treating their own patients on-site and the MRI will assist them in offering such treatment. . . .

Considering the recent decision by the Court of Appeals in *Gilbert v. Com.*, _____ S.W.3d _____ (Ky. App. 2008), we are convinced that the circuit court's above reasoning and interpretation of the private office exemption of KRS 216B.020(2)(a) was mistaken and erroneous.

In *Gilbert*, the Court of Appeals was squarely faced with the proper scope of the private office exemption found in KRS 216B.020(2)(a). *Id.* Relevant to this appeal, the *Gilbert* Court held that the availability of the private office exemption is dependent upon "the kind of activity that takes place at the office for which the exemption is sought." *Id.* at _____. In *Gilbert*, a physician sought the

private office exemption for three separate offices that performed MRI services.

The Court noted that no physician regularly treated patients at these offices; rather, the offices were more akin to a “diagnostic testing facility.”

The evidence presented at the show cause hearing does not describe a private office or clinic of a physician. It does, however, describe a facility which performs diagnostic testing on patients who, but for their referral to these MRI testing facilities by their own treating physicians, would have no connection to Dr. Gilbert's medical practice.

The Cabinet found that at all three offices “[t]here are no physicians present for a substantial portion of the time [and still] the MRI machines [were] running and scanning individuals;” that “[r]egardless of which facility performs the MRI scan, virtually all of the scans are read in Lexington;” and that the “MRI services are billed ‘globally’ [meaning that Dr.] Gilbert is reimbursed for both the technical and professional component of the MRI service.” The record shows that MRI technicians, not physicians, conduct each MRI scan performed on each patient.

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These offices had every appearance that they were something other than the private offices or clinics of a physician—specifically, they had all the hallmarks of a diagnostic testing facility. The manner of operation of these facilities establishes one obvious fact. The only reason these patients presented themselves at the testing facility was that, unlike a patient whose blood or urine or biopsied tissue is tested, these patients could not separate themselves from the biological subject matter of the test—their bodies.

Id. at ____.

As in *Gilbert*, we believe Muhlenberg Medical's proposed MRI facility, likewise, constituted a diagnostic testing facility and not a private office of a physician. *See Gilbert*, ____ S.W.3d _____. According to Muhlenberg Medical, the proposed MRI facility would "offer no medical services other than the technical component of the MRI services." The physician members of Muhlenberg Medical would continue to practice medicine in an adjacent office and would merely provide "general medical oversight" at the MRI facility. As the physician members of Muhlenberg Medical were not radiologists, Muhlenberg Medical intended to contract with radiologists to interpret the MRI images. These independent radiologists would separately bill patients for their services (referred to as the "professional component"). Thus, Muhlenberg Medical would only bill patients for the costs of the MRI scan (referred to as the "technical component"). Moreover, it was undisputed that patients from physicians other than Muhlenberg Medical would be served by the MRI facility. Simply put, the facts of this case do not demonstrate that the proposed MRI facility constituted a private office of a physician where a patient would customarily receive medical care by a physician or her employees. Rather, the facts clearly reveal a diagnostic testing facility where a patient would merely present his or her body for a diagnostic MRI scan and nothing more.

Considering the nature of activity to be performed at Muhlenberg Medical's proposed MRI facility, we hold that Muhlenberg Medical was not

entitled to the private office exemption of KRS 216B.020(2)(a) and that the circuit court erred by concluding otherwise. *See Gilbert*, ____ S.W.3d ____.

For the foregoing reasons, the Opinion and Order of the Franklin Circuit Court is reversed and the December 12, 2005, final order of the Cabinet for Health and Family Services is reinstated.

ALL CONCUR.

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