

IN THE COURT OF APPEALS OF THE  
STATE OF OREGON

Michael DEYETTE  
and Arlen Porter Smith,  
*Petitioners,*

*v.*

PORTLAND COMMUNITY COLLEGE,  
*Respondent.*  
A168322

On respondent's motion to reconsider order filed March 12, 2019, petitioners' response filed April 19, 2019, and respondent's reply filed June 28, 2019.

P.K. Runkles-Pearson and Miller Nash Graham & Dunn LLP for motion and reply.

Harrison Latto for response.

Before DeVore, Presiding Judge, and Egan, Chief Judge, and Powers, Judge.

DeVORE, P. J.

Reconsideration allowed; previous order entered February 26, 2019, vacated; judicial review dismissed.

**DeVORE, P. J.**

In this rule challenge under ORS 183.400(1), petitioners seek judicial review of a policy (the academic policy) adopted by Portland Community College (PCC). They assert that the academic policy is a “rule” within the meaning of ORS 183.310(9), and, therefore, invalid because it was not adopted through formal rulemaking procedures. *See* ORS 183.400(4)(c) (court shall declare administrative rule invalid if it was “adopted without compliance with applicable rulemaking procedures”). Shortly after the petition for judicial review was filed, PCC filed a motion to determine jurisdiction, asserting that the case should be dismissed for lack of jurisdiction because PCC “is not an ‘agency’ whose rules are subject to ORS 183.400.” The Appellate Commissioner agreed and, in October 2018, entered an order dismissing the judicial review, reasoning that PCC is not an “agency” within the meaning of ORS 183.310(1) and, therefore, the academic policy at issue, whether or not it would otherwise meet the definition of a rule, is not subject to judicial review pursuant to ORS 183.400.

On petitioners’ petition for reconsideration, the Appellate Commissioner vacated the dismissal order on February 26, 2019, concluding that the jurisdictional issue should be considered by the department that would consider the case on the merits. PCC sought reconsideration of that order, asserting that the jurisdictional issue should be considered before full briefing on the merits was completed; petitioners agreed. We agree with the parties, allow reconsideration, vacate the commissioner’s February 26, 2019, order, and dismiss this judicial review.

The question at issue is whether PCC is an agency, as that term is defined in ORS 183.310(1). *See State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009) (in interpreting a statute, the court looks first to the statute’s text, in context; there is no more persuasive evidence of legislative intent than the words used by the legislature). As explained below, we conclude that PCC is not an agency and, accordingly, dismiss the petition for judicial review.

We begin with the text of the statutes at issue. Pursuant to ORS 183.400(1),

“[t]he validity of any rule may be determined upon a petition by any person to the Court of Appeals in the manner provided for review of orders in contested cases. The court shall have jurisdiction to review the validity of the rule whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, but not when a petitioner is a party to an order or a contested case in which the validity of the rule may be determined by a court.”

Thus, by its terms, the statute provides for judicial review to determine the validity of “any rule.” A “rule,” in turn, is defined as “any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency.” ORS 183.310(9). In other words, the academic policy is subject to judicial review under ORS 183.400(1) only if it is the policy of an “agency.” That term is defined in ORS 183.310(1): “‘Agency’ means any state board, commission, department, or division thereof, or officer authorized by law to make rules or to issue orders, except those in the legislative and judicial branches.”

Petitioners contend that PCC falls within that statutory definition of “agency.” It is undisputed that PCC is a community college organized under ORS chapter 341 and, accordingly, is a public corporation governed by a board elected directly by the voters from a defined local boundary. *See* ORS 341.025; ORS 341.275 - 341.290. Furthermore, under ORS 341.290, the “board of education of a community college district” is authorized to “[e]nact rules for the government of the community college, including professional personnel and other employees and students of the community college” and to “[p]rescribe rules for the use and access to public records of the district that are consistent with ORS 192.314, and education records of students under applicable statute and federal law and rules of the commission.”

In light of ORS 341.290, petitioners assert that PCC is authorized by statute to make rules and is, therefore, an agency. In particular, petitioners assert that PCC

is an “officer” under ORS 183.310(1).<sup>1</sup> In petitioners’ view, “[w]henever some public corporation is explicitly authorized by a state statute to adopt rules, that govern all citizens, that public corporation should be deemed an ‘agency’” under ORS 183.310(1). We are not persuaded by petitioners’ arguments.

First, with respect to petitioners’ contention that a community college makes rules that “govern all citizens,” we observe that the statute cited by petitioners relates to a community college’s authority to make rules “for the government of *the community college*,” and “for use and access to public records of *the district*.” ORS 341.290(2), (17) (emphasis added). Contrary to petitioners’ argument, the rules of a community college do not “govern all citizens” but, instead, govern the college itself (including professional personnel, other employees, and students).

More importantly, petitioners’ assertion that a community college is an “officer” and, therefore, an agency, is not supported by the statutory text, in context. In interpreting a statute, we give words of common usage that are not defined therein their plain, natural, and ordinary meaning. *See PGE v. BOLI*, 317 Or 606, 611, 859 P2d 1143 (1993). The word “officer” generally refers to an individual, not an organization. *See Webster’s Third New Int’l Dictionary* 1567 (unabridged ed 2002) (“one who is appointed or elected to serve in a position of trust, authority, or command”). However, under ORS 341.290, it is not an individual but, instead, the “board of education of a community college district” that is authorized to enact rules governing the college.<sup>2</sup>

Furthermore, with respect to the specific usage of the term officer in ORS chapter 183, we observe that,

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<sup>1</sup> Petitioners make several other arguments in support of their contention that PCC is an “agency” as that term is defined in ORS 183.310(1); we reject those arguments without discussion.

<sup>2</sup> To the extent that petitioners assert that the ability of a community college’s board to enact rules makes a community college an agency, we observe that, first, the statute refers to a *state board*, which a community college is not. And, second, the phrase “authorized by law to make rules” in ORS 183.310(1) modifies the term “officer.” The ability of the *board* of a community college to make rules governing the college does not make the college an agency under that provision of the statute.

under ORS 183.325 an “agency may delegate its rulemaking authority to an officer or employee within the agency. \*\*\* Any officer or employee to whom rulemaking authority is delegated under this section is an ‘agency’ for the purposes of the rulemaking requirements of this chapter.” That statute clarifies that the term “officer authorized by law to make rules” in ORS 183.310(1) refers to officers—that is, individuals—to whom a “state board, commission, department, or division thereof” has delegated rulemaking authority under ORS 183.325. (Emphasis added.) A community college is neither an individual, nor is it part of “state” government. See ORS 174.111 (“‘state government’ means the executive department, the judicial department and the legislative department”); ORS 174.117(1)(e) (a “community college district or community college service district established under ORS chapter 341” is a “special government body”). In short, the statutory text and context lead us to conclude that a community college is not an “officer authorized by law to make rules.” We reject petitioners’ assertion that PCC is an agency under ORS 183.310(1).

That interpretation is consistent with our decision in *Cole v. Chemeketa Community College*, 58 Or App 77, 647 P2d 935 (1982). In that case, we considered whether the exclusive remedy of an employee who asserted that he had been wrongfully discharged by the community college was by writ of review under ORS 34.040(1). That statute provides that a writ of review

“shall be allowed in all cases in which a substantial interest of a plaintiff has been injured and an inferior court including an officer or tribunal *other than an agency as defined in ORS 183.310(1)* in the exercise of judicial or quasi-judicial functions appears to have:

- “(a) Exceeded its jurisdiction;
- “(b) Failed to follow the procedure applicable to the matter before it;
- “(c) Made a finding or order not supported by substantial evidence in the whole record;
- “(d) Improperly construed the applicable law; or
- “(e) Rendered a decision that is unconstitutional.”

ORS 34.040(1) (emphasis added). We held that the defendant community college’s board of education, when it sustained the plaintiff’s termination, was exercising a quasi-judicial function and “its decision was subject to review by a writ of review” under ORS 34.040(1) “and not otherwise.” *Cole*, 58 Or App at 83. Necessary to that holding was the determination that the community college was not “an agency as defined in ORS 183.310(1)”; otherwise, the defendant would not have been within the scope of ORS 34.040.

In sum, contrary to petitioners’ contention, PCC is not an “agency” within the meaning of ORS 183.310(1). Thus, the academic policy is not a “rule” within the meaning of ORS 183.310(9) and is not subject to judicial review under ORS 183.400.

Reconsideration allowed; previous order entered February 26, 2019, vacated; judicial review dismissed.