

(2005). The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, we “‘give effect to that plain meaning.’” *Id.* (quoting Dept. of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9; 43 P.3d 4 (2002)). In determining the plain meaning of a provision, we look to the text of the statutory provision in question, as well as “the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Id.* An undefined term is “given its plain and ordinary meaning unless a contrary legislative intent is indicated.” Ravenscroft v. Wash. Water Power Co., 136 Wn.2d 911, 920-21; 969 P.2d 75 (1998). State v. Ervin, 169 Wn.2d 815, 820 (2010).

The statute at issue in this matter is RCW 48.04.010(5), which states:

(5) A licensee under this title may request that a hearing authorized under this section be presided over by an administrative law judge assigned under chapter 34.12 RCW. Any such request shall not be denied.

Respondents argue that this statute does not require a person to be a licensee in order to request that the hearing in this matter be heard by the Office of Administrative Hearings (“OAH”). According to the most basic of all maxims of statutory construction, in order to determine what a statute means, we look to the words themselves. The statute says a “licensee” may request a hearing be presided over by an OAH judge.

The word “licensee” is not defined for purposes of Chapter 48.04 RCW. Fortunately, the Legislature has defined the word elsewhere in the Insurance Code. RCW 48.18.543(a) defines licensee to mean “every insurance producer licensed under chapter 48.17 RCW.” In Chapter 48.56 RCW (the Insurance Premium Finance Company Act), “licensee” is defined as “a premium finance company holding a license issued by the Insurance Commissioner under this chapter.” Under the definition of “licensee” in Chapter 48.87 RCW, which governs the Joint Underwriting Association (“JUA”) for midwives and birthing centers, a licensee is “a person or facility licensed to provide midwifery services

under chapter 18.50, 18.79, or 18.46 RCW.” Similarly, in Chapter 48.88 RCW, creating the JUA for day care centers, “licensee” means “any person or facility licensed to provide day care services pursuant to chapter 74.15 RCW.” Without question, the Washington State Legislature defines “licensee” to mean one who possesses a particular license under Washington law.

Not surprisingly, the Legislature’s definition is the same as the dictionary definition. According to Merriam-Webster.com, the definition of “licensee” is “one that is licensed.” Black’s Law Dictionary (Abridged 6th Edition) defines “licensee” as “person to whom a license has been granted.”

Respondents admit that they do not meet this definition. Respondents’ Memorandum at pg. 1, ll 14-17. The analysis can and should end there. “The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, we give effect to that plain meaning.” Ervin, 169 Wn.2d at 820 (internal citation omitted).

However, Respondents wisely do not argue that they meet the definition of “licensee.” Instead, Respondents argue that the Legislature did not really mean “licensee” when it said “licensee.”

b. Respondents’ reading of RCW 48.04.010(5) ignores the word “licensee.”

“[I]t is a fundamental principle of statutory construction that courts must not construe statutes so as to nullify, void or render meaningless or superfluous any section or words of the statute.” In re: Dependency of K.D.S., 176 Wn.2d 644, 656 (2013), quoting Taylor v. City of Redmond, 89 Wn.2d 315, 319 (1977). Respondents’ reading of the statute is that anyone aggrieved by an act of the OIC is entitled to a choice of forum for their hearing. However, the Legislature said that only “a licensee under this title” has that right. Respondents’ reading “nullifies, voids, or renders meaningless or superfluous” those words.

Again, the analysis of Respondents' request can and should be complete. However, should the Hearing Officer wish to have an additional basis upon which to deny Respondents' request, the Ervin Court has supplied it.

c. **RCW 48.04.010(3) makes clear that "licensee" means just that, and *only* that.**

"In determining the plain meaning of a provision, we look to the text of the statutory provision in question, as well as 'the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" *Id.* When subsection (3) of RCW 48.04.010 is considered, OIC's reading of the statute becomes indisputable.

Unless a **person aggrieved by a written order** of the commissioner demands a hearing thereon within ninety days after receiving notice of such order, **or in the case of a licensee** under Title 48 RCW within ninety days after the commissioner has mailed the order to the licensee at the most recent address shown in the commissioner's licensing records for the licensee, the right to such hearing shall conclusively be deemed to have been waived.

RCW 48.04.010(3) (emphasis supplied).

Subsection (1) of the statute makes a hearing available to "any person aggrieved" by an act of the Commissioner. There is no dispute that this group includes Respondents. However, in subsection (3), the Legislature identified a sub-group of "aggrieved persons." The larger group is "persons aggrieved by a written order of the Commissioner." That group has ninety days after receiving notice of the order in which to request a hearing. The smaller sub-group, **licensees**, must request a hearing within ninety days after the Commissioner mails the order using the most recent address the licensees provided to OIC. "Persons aggrieved by a written order" cannot mean the same thing as "licensees," because different rules apply to each.

Again, the Supreme Court of Washington has provided guidance. "It is a basic rule of statutory construction that the legislature intends different terms used within an

individual statute to have different meanings.” State v. Tracer, 173 Wn.2d 708 (2012), citing State v. Roggenkamp, 153 Wn.2d 614 (2005).

Thus, the Washington State Legislature intended that the group that includes all aggrieved persons is different from the group that includes only licensees. Respondents, by their own admission, are not members of the group called “licensees.” Therefore, Respondents are not entitled to choice of forum under RCW 48.04.010(5) which, by its terms, restricts that choice to licensees.

Because the plain language of the statute so clearly supports OIC’s reading of RCW 48.04.010(5), further analysis should not be done, according to the Washington Supreme Court. The Court has said that Legislative history and intent are a last resort, to be used only where a statute is susceptible to more than one reasonable interpretation. *See, e.g., State v. Ervin*, 169 Wn.2d at 820, *citing Christiansen v. Ellsworth*, 162 Wn.2d 365 (2007).

If the plain language is subject to only one interpretation, our inquiry ends because plain language does not require construction. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007); State v. Thornton, 119 Wn.2d 578, 580, 835 P.2d 216 (1992). “Where statutory language is plain and unambiguous, a statute’s meaning must be derived from the wording of the statute itself.” Wash. State Human Rights Comm’n v. Cheney Sch. Dist. No. 30, 97 Wn.2d 118, 121; 641 P.2d 163 (1982).

HomeStreet, Inc. v. Dep’t of Revenue, 166 Wn.2d 444, 451 (2009).

RCW 48.04.010(5) is unambiguous. Nonetheless, since Respondents rely almost entirely upon arguments of legislative intent, OIC will provide argument and authority demonstrating that the Hearing Officer may uphold OIC’s reading of the statute on that basis, as well.

II. The Legislature Explicitly Set Forth The Hearing Procedures for OIC and OAH Exactly As Those Agencies Have Interpreted Them For 32 Years.

a. A Specific Statute Governs Over A General Statute Where Both Apply.

“A specific statute will supersede a general one when both apply.” Katsura v. Dep’t of Labor & Industries, 169 Wn.2d 81, (2010), *citing* Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Com’n, 123 Wn.2d 321, 630 (1994). “We therefore begin our analysis with the applicable specific statutory provisions. To do otherwise would be to pretend to respect the legislature’s intent while ignoring the clearest indication of that intent as codified by the legislature.” *Id.*

Chapter 48.04 RCW is, of course, the specific chapter which applies to hearings before the Insurance Commissioner. As set forth above, that chapter clearly provides a choice of forum only to licensees. Chapter 34.12 governs the OAH and applies to hearings before any agency that uses OAH judges. Chapter 48.04, as the more specific statute applicable to this matter, governs.

Once again, analysis of the Legislature’s intent can and should end here. If further bases to uphold OIC’s reading of RCW 48.04.010(5) are desired, however, they exist.

b. The Legislature Has Specified When Hearings Must Be Held Before OAH Judges. This Is Not One Of Those Situations.

The Supreme Court provides us yet another maxim of statutory construction which demonstrates that Respondents are not entitled to hearing before an OAH judge.

Under this canon of statutory construction, “[w]here a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius*—specific inclusions exclude implication.” Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 571, 980 P.2d 1234

(1999) (quoting Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County, 77 Wn.2d 94, 98, 459 P.2d 633 (1969)).

In re Det. of Lewis, 163 Wn.2d 188, 196 (2008).

i. The Legislature has set forth specific instances where OIC hearings are to be presided over exclusively by OAH judges. This is not one of them.

Subsections (5) and (6) of RCW 48.04.010 provides the specific instances where a hearing “shall” be presided over by an ALJ assigned under RCW 34.12. None of those instances is presented here. The Legislature requires the OIC Hearing Officer to transfer matters to OAH where a dispute exists over disapproval of a carrier’s rates, or where a licensee so requests. If the Legislature wanted to, it could have required the Hearing Officer to transfer matters to OAH for hearing in other situations, such as where a non-licensee so requests. It did not. Therefore, the Legislature did not intend to require the Hearing Officer to transfer this matter to OAH.

ii. The Legislature has set forth specific agencies whose hearings are to be presided over exclusively by OAH judges. OIC is not one of them.

RCW 34.12.035 provides that an OAH judge will preside over State Patrol disciplinary hearings. Under RCW 34.12.036, the Attorney General may request assignment of an administrative law judge where landlord/tenant proceedings are necessary under Title 59 RCW. Whistleblower proceedings are to be conducted by an OAH judge when requested by a local government under RCW 34.12.038. Other than those agencies, the Legislature has not authorized OAH to take exclusive jurisdiction over any other agency.

Again, the Legislature has demonstrated that it will require OAH jurisdiction where it sees fit. The Legislature did not see fit to require OAH jurisdiction where a non-licensee requests that his case be transferred to OAH.

c. Both Chapter 34.12 and the Washington Insurance Code explicitly authorize the hearing procedures utilized by OIC.

Respondents failed to mention, or are unaware of, RCW 34.05.001. There, the Legislature actually explicitly articulates its intent in enacting the 1988 Administrative Procedure Act – *which postdates the creation of the OAH by seven years*. “The legislature intends that to the greatest extent possible and unless this chapter clearly requires otherwise, current agency practices and court decisions interpreting the Administrative Procedure Act in effect before July 1, 1989, shall remain in effect.” Despite the clarity of this statement demonstrating that the Legislature had no intention of abolishing hearings held by agencies themselves, we will go on to examine the actual wording of the statutes governing those hearings to show how that, too, clearly authorizes denial of Respondents’ request.

i. Chapter 34.12 RCW explicitly contemplates that OAH judges will conduct hearings for state agencies only where those agencies do not conduct their own.

“Whenever a state agency conducts a hearing which is not presided over by officials of the agency who are to render the final decision, the hearing shall be conducted by an administrative law judge assigned under this chapter.” RCW 34.12.040. *See, also*, WAC 10-05-050. Respondents ignore the first phrase of this statute just as they ignore the word “licensees” in RCW 48.04.010(5). By the plain wording of this statute, the Legislature explicitly created a system where agencies’ hearings are conducted by OAH judges *only* where they are not presided over by officials of the agency. The second sentence of the statute makes clear why.

In assigning administrative law judges, the chief administrative law judge shall wherever practical (1) use personnel having expertise in the field or subject matter of the hearing, and (2) assign administrative law judges primarily to the hearings of particular agencies on a long-term basis.

Far from subscribing to Respondents' view that hearings conducted by an agency charged with enforcing an area of law are inherently biased, the Washington Legislature appreciates that resources are utilized more economically when hearings are conducted by ALJ's who know the area of law. Where an agency does not have a dedicated ALJ who hears only that agency's cases, RCW 34.12.040 empowers OAH to do the next best thing: assign all of that agency's cases to one ALJ.

Once again, the analysis could end here. But the Washington Insurance Code provides yet more bases for OIC's reading of RCW 48.04.010(5).

ii. Both The Washington Insurance Code and the Administrative Procedure Act Authorize the Insurance Commissioner to Conduct Hearings On Matters Under The Insurance Code.

Most OIC hearings are "presided over by officials of the agency who are to render the final decision" because the Legislature has empowered the Insurance Commissioner to conduct his own hearings on matters under the Insurance Code, and to delegate his authority to decide these matters to an ALJ.

"The Commissioner has the authority expressly conferred upon him or her by or reasonably implied from the provisions of this code." RCW 48.02.060(1). "Any power or duty vested in the Commissioner by any provision of this code may be exercised or discharged by any deputy, assistant, examiner, or employee of the commissioner acting in his or her name and by his or her authority." RCW 48.02.100. Of course, Chapter 48.04 not only authorizes, but requires the Commissioner to conduct hearings. The Administrative Procedure Act provides the Commissioner that same authority. Under RCW 34.05.464, the Commissioner "may appoint a person to review initial orders and to prepare and enter final agency orders."

In addition, RCW 34.05.425(1) also specifically authorizes the Commissioner to designate who is to preside over hearings under the Insurance Code:

Except as provided in subsection (2) of this section, in the discretion of the agency head, the presiding officer in an administrative hearing shall be:

(a) The agency head or one or more members of the agency head;

(b) If the agency has statutory authority to do so, a person other than the agency head or an administrative law judge designated by the agency head to make the final decision and enter the final order; **or**

(c) One or more administrative law judges assigned by the office of administrative hearings in accordance with chapter 34.12 RCW.

Note the disjunctive in this statute: The Legislature gave the Commissioner discretion to name the presiding officer in OIC administrative hearings from among himself, an ALJ or other designee, **OR** the OAH. Thus, OIC is not required to designate the OAH to preside over its hearings *at all*. Only the requirements set forth in section 11(b)(i), above require OIC to designate an OAH judge for *any* hearings. Those do not include hearings requested by non-licensees.

Even if the Legislature had not specifically set forth the requirement that a person be a licensee in order to select the forum for hearing (RCW 48.04.010(5)), the Legislature gave OIC authority under the Administrative Procedure Act to have instituted that requirement itself. Under RCW 34.05.220(1)(a), "Each agency may adopt rules governing the formal and informal procedures prescribed or authorized by this chapter and rules of practice before the agency, together with forms and instructions. If an agency has not adopted procedural rules under this section, the model rules adopted by the chief administrative law judge under RCW 34.05.250 govern procedures before the agency."

Finally, we note that the Legislature gave the Commissioner the option of making the final decision in a matter *even where the hearing was held before an OAH judge who issued an initial ruling*. See RCW 34.05.461(1), which states, in relevant part:

(b) If the presiding officer is a person designated by the agency to make the final decision and enter the final order, the presiding officer shall enter a final order; and

(c) If the presiding officer is one or more administrative law judges, the presiding officer shall enter an initial order.

Despite the arguments submitted by Respondents, which were made to the Legislature but not incorporated into the statutory procedures adopted, the Legislature did not create OAH as the sole hearing officer available to agencies. The Legislature gave the Commissioner clear, explicit authority both in the Insurance Code and in the Administrative Procedure Act to preside over his own hearings. In fact, the Legislature gave the Commissioner authority to retain jurisdiction over all matters under the Insurance code, even those initially heard by the OAH. There is simply no way to view this statutory framework consistent with Respondents' claim that the Legislature intended persons to be able to bypass OIC jurisdiction by taking their claims to OAH.

d. Because the legislature created the statutory hearings procedures for both OIC and OAH, respondents' complaints about those procedures are appropriately addressed to that body, not to a hearing officer duly appointed under those procedures.

Respondents, in their zealous effort to create an issue where none exists, endeavor mightily to suggest – without actually saying – that the hearing system used by OIC since 1947 is corrupt and that a litigant cannot hope to get a fair hearing under such a system. Respondents' feverish exertions to persuade the Hearing Officer that the Legislature created the OAH as a “solution” to the “problem” of agencies conducting their own hearings cannot obscure the fatal flaw in that argument: when the Legislature created OAH, and when it re-enacted the Administrative Procedure Act seven years later, it maintained the authority of agencies such as OIC to conduct their own hearings. If Respondents were correct that the Legislature intended to abolish hearings before agencies themselves, it would have done so. Similarly, if the Legislature had intended for Respondents to be entitled to a hearing before an OAH judge whenever they chose, the Legislature would have said so outright. At the least, the Legislature would have repealed RCW 48.04.010(5). It did not.

Respondents' theory, in addition to ignoring the statutory framework of both OIC and OAH as discussed above, also ignores history. Chapter 48.04 was first enacted in 1947, Chapter 34.12 RCW in 1981. For 32 years, OIC and OAH, both creatures entirely of statute, have conducted hearings as directed by the Legislature. During those 32 years, in 1988, the Legislature said "current agency practices and court decisions interpreting the Administrative Procedure Act in effect before July 1, 1989, shall remain in effect." RCW 34.05.001. According to the dates of amendment of the statutes comprising Chapters 48.04 and 34.12, those "agency practices" were revised in 1982, 1984, 1985, 1986, 1988, 1989, 1990, 1992, 1993, 1994, 1995, 2000, 2002, 2007, 2010, and 2011. Yet at none of those times did the Legislature change the relationship between OIC and OAH. OIC is aware of no effort by anyone during those 32 years to modify or terminate the dual system created by the Legislature. Should Respondents desire to do so now, their remedy lies with the Legislature that created it, not OIC.

CONCLUSION

Respondents make the astounding statement that "Implicit in the hearing examiner's hesitancy to transfer this case to the Office of Fair Hearings [SIC] is the concept that the Commissioner has authority to deny respondents' request. We are aware of no legislative grant or judicial authority that supports this concept." Respondents are mistaken. RCW 48.04.010(5) is that "legislative grant." That statute explicitly limits the right to request transfer of this matter to "licensees." Since Respondents are not licensees, they are not entitled to a grant of their request.

It is not often in the law that a question has a bright-line answer. This is one of those rare times. The law is unmistakable. Respondents' request for hearing before an OAH judge should be denied.

Respectfully submitted this 25th day of June, 2013.



Andrea L. Philhower
OIC Staff Attorney

CERTIFICATE OF MAILING

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing OIC'S RESPONSE TO RESPONDENTS' RCW 34.12 REQUEST on the following individuals via US Mail, e-mail and Hand Delivery at the below indicated addresses:

DELIVERED VIA:

US MAIL:

Jerry Kindinger
1201 Third Avenue, Suite 3400
Seattle, WA 98101-3034

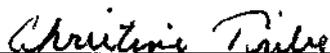
EMAIL:

kindinger@ryanlaw.com

HAND DELIVERED:

Hearings Unit
Office of the Insurance Commissioner
Attn: Patricia D. Petersen, J.D., Chief Hearing
Officer
P.O. Box 40255
Olympia, WA 98504-0255

SIGNED this 25th day of June, 2013, at Tumwater, Washington.



Christine Tribe