

**DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIES
STATE OF WASHINGTON**

In re: CASCADE VETERINARY
CLINICS

NO. 2023-007-APP

DIRECTOR'S ORDER

Joel Sacks, Director of the Washington State Department of Labor and Industries, having considered the November 21, 2022 Decision Letter of the Washington State Apprenticeship and Training Council (Council), the appeal submitted by the American Veterinary Medical Association, Washington State Veterinary Medical Association, the Washington State Association of Veterinary Technicians, and the National Association of Veterinary Technicians in America (collectively "the Associations"), briefing submitted by the parties, and the record created by the Council, issues this Director's Order.

The Director makes the following Findings of Fact, Conclusions of Law, and Final Order.

I. FINDINGS OF FACT

- 1.1 On September 20, 2022, Cascade Veterinary Clinics (CVC) submitted a request for approval of new standards for the Licensed Veterinary Technician (LVT) occupation. CVC has provided veterinary care in the greater Wenatchee area since 1964. CVC comprises three veterinary clinics, with approximately 70 employees. CVC sought adoption of its Cascade Veterinary Clinic's Apprenticeship Program Standards to address chronic skill shortages that were negatively affecting its veterinary services and build an experienced, skilled workforce.
- 1.2 Accompanying the CVC request was a May 13, 2022 letter from the Chairperson of the Washington State Veterinary Board of Governors (Veterinary Board), expressing support for the proposed program. The letter indicated that in the event the program was

approved, the Veterinary Board intended to undertake rulemaking to clarify that completion of a registered apprenticeship program would serve to satisfy RCW 18.92.128(2)'s requirement for successful completion of "a post-high school course approved by the [Veterinary Board] in the care and treatment of animals." See WAC 246-935-060 (detailing eligibility criteria for LVT licensure).

- 1.3 On September 30, 2022, the Associations objected to CVC's request and requested an adjudicative hearing to address, among other issues, whether the LVT occupation constituted an "apprenticeable occupation." This was based on the Associations' disagreement with the Veterinary Board's interpretation of RCW 18.92.128, asserting that the agency would lack authority to license individuals graduating from a registered apprenticeship program (as opposed to an accredited college program).
- 1.4 The Council considered CVC's proposal for new standards at its October 20, 2022 quarterly meeting. The Council found that CVC's standards met the Washington State Department of Labor and Industries criteria for approval and heard statements from the Associations' counsel. Thereafter, the Council ruled that the Associations did not have standing and unanimously approved CVC's standards (with amendment).
- 1.5 On November 21, 2022, the Council confirmed the rejection of the request for a hearing in a written appealable decision on the basis that the Associations lacked standing.
- 1.6 On December 21, 2022, the Associations timely appealed.

II. CONCLUSIONS OF LAW

- 2.1 The Director has the authority to consider this matter. RCW 49.04.065.
- 2.2 RCW 34.05.530 sets the test for standing: (1) The agency action has prejudiced or is likely to prejudice that person, (2) that person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged, and (3) a judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action. *See also Seattle Bldg. & Const. Trades Council v. Apprenticeship & Training Council (SBCTC)*, 129 Wn.2d 787, 793, 920 P.2d 581 (1996).
- 2.3 The first and third prongs are commonly known as the "injury in fact" test, and the second prong is known as the "zone of interest" test. *SBCTC*, 129 Wn.2d at 793-94.
- 2.4 Because this decision is resolved on the zone of interest test, it will not reach whether there is an "injury in fact."
- 2.5 The standards related to the zone of interest test are well established:

Resulting from concerns that not every person "potentially affected by agency action in a complex interdependent society" should be permitted to have judicial review, the "zone of interest" test serves

as a filter to limit review to those for whom it is most appropriate. William R. Andersen, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64 Wash. L. Rev. 781, 824-25 (1989). However, although the zone of interest test serves as an additional filter limiting the group which can obtain judicial review of an agency decision, the “test is not meant to be especially demanding.” *Clarke v. Securities Industry Ass’n*, 479 U.S. 388, 399, 107 S. Ct. 750, 757, 93 L.Ed.2d 757 (1987). “The test focuses on whether the Legislature intended the agency to protect the party's interests when taking the action at issue.” *St. Joseph Hosp.*, 125 Wash.2d at 739-40, 887 P.2d 891 (citing Andersen, 64 Wash. L. Rev. at 825).

SBCTC, 129 Wn.2d at 797.

- 2.6 In *SBCTC*, the Supreme Court considered whether competitors of an apprenticeship program could object and receive an adjudicative hearing about whether a program should be approved. *Id.* at 790, 798. The Court held that the Council was required to consider objections of competitors. *Id.* at 798.
- 2.7 After the 1996 decision, Council procedures were modified by rule to allow a competitor to object to proposed standards, proposed amendments to existing standards, or initial committee. WAC 296-05-011(2); WSR 18-17-149. WAC 296-05-003 defines “competitor” as certain apprenticeship programs.
- 2.8 WAC 296-05-011(2) authorizes only competitors to object and sets out their method to object, and it delineates the responsibilities of L&I and the Council in response. “[T]o express one thing in a statute implies the exclusion of the other.” *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002)); *State v. Kelley*, 168 Wn.2d 72, 83, 226 P.3d 773 (2010) (“Expression of one thing in a statute implies exclusion of others, and this exclusion is presumed to be deliberate.”). Thus, when the rules were adopted it was a deliberate decision to list only competitors with the procedures for how they were to object, and the Councils actions specific to them.
- 2.9 The Council based its decision that “the Associations were not entitled to an adjudicative proceeding” because it ruled that the Associations “lacked standing to object to CVC’s proposed standards under either the Apprenticeship Rules, WAC 296-05, or the Administrative Procedure Act, RCW 34.05.” Council Letter 2 (Oct. 20, 2022). The Council further determined that because “the Associations are not apprenticeship programs” that they do not meet the definition of a “competitor” under WAC 296-05-003. *Id.*
- 2.10 The Associations take exception to the proposition that the regulation limits standing to competitors, arguing, “in enshrining that status for competitive existing apprenticeship programs, the Department and the Council have codified the specific outcome of *SBCTC* while—as the decision at issue here makes clear—flouting its rationale.” Associations

Appeal 5 (Dec. 21, 2022). The Associations do not argue that they are competitors within the meaning of apprenticeship rules or statutes, nor are they under WAC 296-05-003 or -011.

- 2.11 The essential inquiry into zone of interest “focuses on whether the Legislature intended the agency to protect the party’s interests when taking the action at issue.” *SBCTC*, 129 Wn.2d at 797; RCW 34.05.530(2). The scope of a rule can delimit who has standing to appeal: “In considering whether that claim is within this zone of interests, we look to both the statute and the regulations promulgated under it.” *Stratman v. Watt*, 656 F.2d 1321, 1324 (9th Cir. 1981).¹ The Legislature has delegated to the Director, with consultation with the Council, the ability to adopt rules about apprenticeship procedures for Council activities. RCW 49.04.010(2). A rule about objectors defines standing because the Legislature delegated to the Director and the Council the ability to delineate what protects the party’s interests. Limiting objectors to competitors serves to facilitate the adoption of apprenticeship programs that act in the best interest of the apprentice.
- 2.12 But the Director nor the parties may inquiry into the merits of WAC 296-05-003 and -011 and the rational for adopting the rule. When the Legislature “specifically delegates rule-making power to an agency, the regulations are presumed valid.” *Haines-Marchel v. Wash. State Liquor & Cannabis Bd.*, 1 Wn. App. 2d 712, 736, 406 P.3d 1199 (2017). A Any challenge would need to arise under the Administrative Procedure Act in superior court. RCW 34.05.570(2); *Kettle Range Conservation Grp. v. Wash. Dep't of Nat. Res.*, 120 Wn. App. 434, 458, 85 P.3d 894 (2003) (to challenge rule, must do so under APA in superior court).
- 2.13 While not relevant to the issue of the Associations’ standing to contest CVC’s proposed new standards, the Director notes that the Veterinary Board has assured the Council through its May 13, 2022 correspondence that graduates of registered LVT apprenticeship programs will be eligible to sit for the LVT licensing examination. While the Associations note their disagreement with the Veterinary Board’s interpretation of the governing statute, the Director agrees with the Council that neither proceedings before the Director nor before the Council is the proper forum to resolve this dispute. In light of the Veterinary Board’s assurances, the Director is satisfied that CVC’s prospective apprenticeship graduates will be eligible for LVT licensure.
- 2.14 The Associations lack standing to object.

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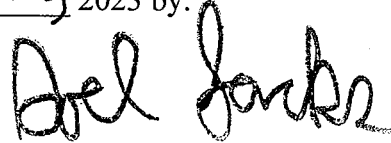
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¹ Federal case law about zone of interest is persuasive. *SBCTC*, 129 Wn.2d at 801.

III. ORDER

The November 21, 2022 Council decision is affirmed.

DATED at Tumwater this 30 day of May 2023 by:

A handwritten signature in black ink that reads "Joel Sacks". The signature is written in a cursive, slightly slanted style.

JOEL SACKS, Director

SERVICE

This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

APPEAL RIGHTS

Reconsideration. Any party may petition for reconsideration. RCW 34.05.470. Any petition for reconsideration must be filed within 10 days of service of this Order and must state the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order or (b) there is specific material error of fact or law. A petition for reconsideration, together with any argument in support thereof, should be filed by emailing it to directorappeal@lni.wa.gov or by mailing or delivering it directly to Joel Sacks, Director of the Department of Labor and Industries, P. O. Box 44001 Olympia, Washington 98504-4001, with a copy to all other parties of record. Filing means actual receipt of the document at the Director's Office. RCW 34.05.010(6).

NOTE: A petition for reconsideration is not required before seeking judicial review.

If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. A timely filed petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the Director does not (a) dispose of the petition or (b) serve the parties with a written notice specifying the date by which the Director will act on the petition. RCW 34.05.470(3).

Judicial Review. Any petition for judicial review must be filed with the appropriate court and served within 30 days after service of this Order. RCW 34.05.542. RCW 49.04.065(3) provides, "Orders that are not appealed within the time period specified in this section and chapter 34.05 RCW are final and binding, and not subject to further appeal." Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in RCW 34.05, Part V, Judicial Review and Civil Enforcement.

DECLARATION OF MAILING

I, Lisa Deck, declare under penalty of perjury under the laws of the State of Washington that the Director's order was sent via email and U.S. Mail, postage pre-paid, on the 30 day of May 2023 to the following:

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DATED this 30 day May 2023, at Seattle, Washington.


LISA DECK