IN THE COURT OF APPEALS OF THE STATE OF OREGON

Washington County, a political Subdivision of the State of Oregon and
Clackamas County, a political subdivision of the State of Oregon,
Petitioners,

v.

Oregon Health Authority and Oversight and Accountability Council,
agencies of the State of Oregon,
Respondents.

Court of Appeals No. A185658

**ORDER DENYING STAY**

In this rule challenge under ORS 183.400(1), petitioners, two Oregon counties, move to stay, pending completion of this judicial review, of the purported rule at issue. Specifically, the counties challenge and seek to stay a new grant distribution formula adopted by respondent Oversight and Accountability Council (OAC) in July 2024. The counties assert that the new formula qualifies as an administrative "rule" as defined by ORS 183.310(9) and that it is invalid because, in adopting it, OAC did not comply with required rulemaking procedures. *See* ORS 183.400(4)(c). For the reasons set forth below, the motion to stay is denied.

The new formula at issue in this case relates to the allocation of funds to be distributed during a 2025-2029 grant cycle for the purpose of providing drug and alcohol treatment services under a voter-passed law called the "Drug Addiction Treatment and Recovery Act of 2020." *See* Ballot Measure 110 (2020); ORS 430.383(2). Respondent Oregon Health Authority (OHA) is responsible for distributing funds collected under that act, ORS 430.387, including funds "to implement Behavioral Health Resource Networks" (the Networks). ORS 430.389(1).[1] In order to effectively administer the funds to the Networks, ORS 430.388 establishes "an Oversight and Accountability Council * * * for the purpose overseeing the implementation of [the Networks]." *See also* ORS 430.389(1) (OAC "shall approve grants and funding provided by the [OHA] in accordance with this section to implement [the Networks] and increase access to community care.").

[1] ORS 430.389(1) defines a Network as "an entity or collection of entities that individually or jointly provide" treatment and recovery services.

As noted previously, the basis for the counties' challenge to OAC's new grant distribution formula is that "the new formula is a 'rule' as defined at ORS 183.310(9)," and that as such, "it was required to be adopted in accordance with" rulemaking procedures under the Oregon Administrative Procedures Act (APA), *see* ORS 183.325 to 183.410, and the Drug Addiction Treatment and Recovery Act itself. As the counties state in their petition for judicial review, "[n]o rulemaking proceedings under the APA were used to adopt th[e] grant distribution formula, including, but not limited to, public notice, hearing, and an opportunity for comment as required by the APA, nor a [Rules Advisory Committee] process as required by ORS 430.390."

Now, the counties move to "stay enforcement" of OAC's new grant distribution formula pending completion of this judicial review proceeding. The court has authority to stay enforcement of administrative rules pending the completion of judicial review. *Northwestern Title Loans v. Division of Finance*, 180 Or App 1, 10, 42 P3d 313 (2002).[2] Specifically, the court "may issue a stay in [a rule-challenge] proceeding pursuant to its inherent authority." *Id.* at 12. Before the court may exercise its inherent authority to stay enforcement of an administrative rule pending completion of rule-challenge proceedings, the petitioner must show that, without a stay, enforcement of the rule "will result in irreparable harm to its rights." *Id.* at 13; *see also Arlington Sch. Dist. No. 3 v. Arlington Ed. Assoc.*, 184 Or App 97, 102, 55 P3d 546 (2002) (a party seeking a stay "must at least demonstrate that irreparable injury *probably* would result if a stay is denied" (emphasis in original)). "The purpose of a stay is to prevent harm to the party challenging the rule during the period of time that the court is considering the challenge." *Northwestern Title Loans*, 180 Or App at 12. In addition, when deciding whether to grant a stay in a rule-challenge proceeding, the court considers the likelihood that a petitioner will prevail on the merits and, if a petitioner shows both irreparable harm and a likelihood of success, the court evaluates the likelihood of harm to the public if a stay is granted.[3]

First, the court addresses the counties' likelihood of success on judicial review. The key question underlying this factor is whether OAC's new formula qualifies as a "rule" under the APA so as to require OAC to have complied with applicable rulemaking procedures. Under ORS 183.400, the court has jurisdiction "to review the validity of [a] rule" to determine, as relevant here, whether it "[w]as adopted without compliance with applicable rulemaking procedures." ORS 183.400(1), (4). However, as the court has explained, "[w]hen the matter in question is not a rule, we have no authority to review it

---

[2] Although *Northwestern Title Loans* was vacated as moot by unpublished order, the court has continued to apply those portions of that case that remain persuasive. *See Lovelace v. Board of Parole*, 183 Or App 283, 288 n 3, 51 P3d 1269 (2002).

[3] Although, under ORS 183.482, to obtain a stay of a final agency order pending completion of judicial review, a petitioner need only show a colorable claim of error, in a rule-challenge proceeding under ORS 183.400, the court requires a showing of a likelihood of success on the merits.

under ORS 183.400." *Smith v. DCBS*, 283 Or App 468, 471-72, 388 P3d 1253, *rev den*, 361 Or 350 (2017). Thus, if OAC's new formula is not a "rule," this judicial review is subject to dismissal. However, if the formula is a "rule," it is undisputed in this case that it was adopted without compliance with applicable rulemaking procedures and is, therefore, invalid. The counties assert that the formula is a "rule"; respondents, for their part, assert that it is not.

The APA defines a "rule" 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). Explicitly excluded from the definition are, among other things, the following:

> "(a) Unless a hearing is required by statute, internal management directives, regulations or statements which do not substantially affect the interests of the public:
>
> "(A) Between agencies, or their officers or their employees; or
>
> "(B) Within an agency, between its officers or between employees.
>
> "(b) Action by agencies directed to other agencies or other units of government which do not substantially affect the interests of the public."

*Id.*

Because the term "rule" in the APA refers to action taken by an "agency," the parties first debate whether OAC meets the definition of an agency. Under the APA, an "agency" is "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 or judicial branches." ORS 183.310(1).

Respondents argue that "OAC is not an 'agency' for the purposes of ORS 183.310(9)" because OAC "is not authorized to make rules." According to respondents, "ORS 430.390 makes it clear that the legislature gave OHA the statutory authority to adopt rules," rather than OAC, *see* ORS 430.390, and that, here, instead of adopting a rule, "OAC developed its funding formula as a starting guideline for making funding decisions."

As to that point, the counties argue that OAC is an agency and, further, that the "new formula is an agency directive that implements ORS 430.389." *See* ORS 430.389(1) (OAC "shall approve grants and funding provided by the [OHA] in accordance with this section to implement [the Networks] and increase access to community care."). Specifically, the counties challenge respondents interpretation of the APA's definition of "agency," arguing that there is no prerequisite that OAC be "authorized by law to make rules" in order to qualify as an "agency" because, as the

counties interpret it, the text "authorized by law to make rules" applies only to "officer[s]," and the new formula was not promulgated by an officer, but by OAC itself as a "board, commission, department, or division" of a non-legislative and non-judicial entity. *See* ORS 183.310(1).

The counties have a likelihood of success in persuading the court, on judicial review, that OAC qualifies as an "agency," the actions of which may constitute rulemaking. In particular, the counties' argument that OAC is an agency, whether or not it is authorized to make rules, in consistent with this court's case law. In particular, in *Deyette v. Portland Community College (A168322)*, 299 Or App 305, 308 n 2, 450 P3d 1037 (2019), *rev den*, 366 Or 205 (2020), the court explained that "the phrase 'authorized by law to make rules' in ORS 183.310(1) modifies the term 'officer.'" Based on that understanding, the court is unlikely to be persuaded by respondents' circular argument that OAC needed to be authorized by the Drug Addiction Treatment and Recovery Act to make rules in order to be an "agency," and for the formula to, in turn, qualify as a rule. At the very least, the counties have some likelihood of success on that point.

However, for the counties to succeed, the court must also determine that OAC's new formula is a rule; that is, a "directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy" that does not fall within one of the listed exclusions to the definition. *See* ORS 183.310(9). Respondents do not address that portion of the APA's definition of "rule," and instead merely assert that the formula was created by OAC as a "starting guideline" under the OAC's authority, pursuant to ORS 430.389, to make "funding decisions." The court agrees with the counties that the labeling of OAC's funding formula is not determinative of its status as a "rule" under the APA's definition. *See McCleery v. Board of Chiropractic Examiners*, 132 Or App 14, 16, 887 P2d 390 (1994) ("An administrative action may be a rule subject to judicial review, even if the agency does not call it a rule."); *id.* (concluding that a statement promulgated by an agency was unenforceable because it was not properly adopted as a rule under the APA, despite the agency's argument that the statement was merely a "recommendation"). Respondents have made no other argument regarding why OAC's funding formula might fall outside of the APA's general definition of a "rule" or fall within one of its listed exceptions.

As noted, the counties argue that the OAC's new formula constitutes a "rule" under the APA because it is a directive that implements ORS 430.389 and, in particular, that in "adopting the formula, the agency has directed" that grant funds will be awarded in a certain way. It appears to the court that the counties' argument on this point has some likelihood of success; the court may determine that the APA's broad definition of "rule" encompasses OAC's new formula based on a conclusion that the formula acts as a directive that binds those subject to it. *See PNW Metal Recycling, Inc. v. DEQ*, 371 Or 673, 696, 540 P3d 523 (2023), *adh'd to as modified on recons*, 372 Or 158, 546 P3d 286 (2024) ("[T]he definition of 'rule' contemplates an *expression* of an agency decision that has 'general applicability' in the sense that it is made operative—*i.e.*, the agency

somehow has communicated the decision in a way that purports to bind those subject to it." (Emphasis in original.)). Further, respondents do not directly dispute the counties' argument on this point; as noted above, they instead reject OAC's status as an "agency" under the APA's definition and argue that, therefore, no action taken by OAC can constitute rulemaking.

Relevant case law provides some support for the counties' argument that OAC's action in adopting the new formula constitutes rulemaking under ORS 183.310(9). *See Gray Panthers v. Pub. Wel. Div.*, 28 Or App 841, 845, 561 P2d 674 (1977) ("In a review proceeding[] under ORS 183.400 we are not concerned with the correctness of the agency decision but rather with the ultimate impact the decision has and therefore the procedural route to the decision. This clearly is a policy decision in administration of a program and its allocated funds set out in general detail by the legislature. A policy decision of that nature must be announced in a properly promulgated rule." (Footnote omitted.)); *Clark v. Pub. Wel. Div.*, 27 Or App 473, 476-77, 556 P2d 722 (1976) ("The challenged provisions * * * enunciate policy decisions" which "affect members of the general public applying for food stamps and do not relate solely to the food stamp eligibility workers as employes of the agency. * * * If they are utilized as a basis for determining food stamp entitlement they must be properly adopted rules."). In light of that case law, in addition to having some likelihood of success in persuading the court that OAC is an agency, the counties have some likelihood of success in arguing that the new formula constitutes a "directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy" under ORS 183.310(9). It follows that the counties have some likelihood of success on judicial review.

However, as explained below, the counties' motion falls short with respect to the requirement that, for a stay to be granted, irreparable harm to the petitioner in the absence of a stay must be shown. "An injury is irreparable if the party cannot receive reasonable or complete redress in a court of law." *Bergerson v. Salem-Keizer School District*, 185 Or App 649, 660, 60 P3d 1126 (2003); *Northwestern Title Loans*, 180 Or App at 13 (denying stay of administrative rule where petitioner's business operations in Oregon might "become unprofitable" but the petitioner "w[ould] not cease to exist and w[ould] be able to continue business as th[e] rule review proceeding" progressed). The counties assert that, in "this case, the harm is that over 20 million fewer dollars in grant funds will be available for [the counties' Networks] under the new formula than were available under the old formula." The counties represent that this would constitute a 17% decrease in funds granted to Washington County and a 37% decrease to funds granted to Clackamas County than granted under the previous grant cycle. Although they acknowledge that they "cannot and do not allege that they will be unable to function or fulfill their core obligations as local government bodies while the judicial review progresses," the counties argue that the harm "is not a matter of degree" because "[f]ailure to grant a stay will absolutely leave [their Networks] with over 20 million fewer dollars to provide drug addiction treatment and recovery services over the next four years."

In response to the motion, respondents argue that the counties' argument regarding harm "is purely speculative" and that the counties have not met the burden of establishing that they are entitled to a stay in this case. Further, respondents note that Clackamas County did not submit an application for grant funding for this cycle, and that, although Washington County did submit an application, it is unclear whether its "application will meet the minimum qualifications, whether it will be recommended to the OAC for funding, and whether the OAC will select it as a grantee." Respondents also point out that, given that the formula is only a "starting point" for decisions regarding grant funding, and "other considerations may affect the amount of funding provided to any individual grantee," and that "ultimately, any funding at alI is dependent upon * * * cannabis tax revenue," the counties' claim that they will receive 20 million fewer dollars under the new formula is speculative and does not justify granting a stay. In reply, the counties contend that respondents "misstate" the counties' argument, which is that the harm is the decrease in grant funds "available" for their Networks—that is, to the Networks *within* the counties—not a decrease in grant funds *directly* to the counties as potential grantees.

The court is not persuaded that the counties have shown irreparable harm sufficient to justify granting a stay in this case. As demonstrated by the court's reasoning in *Northwestern Title Loans*, a petitioner seeking to stay enforcement of a purported administrative rule must meet a relatively high burden to show irreparable harm. Again, in that case, although it was acknowledged that, in the absence of a stay, the petitioner's business might become unprofitable as a result of the challenged rule, the court did not consider that sufficient to constitute "irreparable harm" for purposes of a stay. Here, as noted, the counties acknowledge that the denial of a stay will not leave them "unable to function or fulfill their core obligations as local government bodies." Although lesser harm than that may suffice to support a stay in a rule-challenge proceeding like this one, the harm the counties *have* identified here does not suffice. Specifically, although the counties assert that their Networks will receive less grant funding under the new formula, their arguments assume that, as a matter of course, a reduction in grant funding meets the standard for irreparable harm to the counties. However, the counties have not connected the asserted "20 million fewer dollars being available" for their Networks to a concrete harm that would flow from the decrease in funds. They have not asserted that their Networks will be unable to function, nor have they described any particular direct impact that less funding will have on the counties. And those shortcomings in the counties' arguments are present even if the court assumes, contrary to respondents' arguments, that the counties' identification of potential harm is not speculative and that, indeed, their Networks will receive "20 million fewer dollars" under the new formula. In other words, even assuming that the counties' calculations are correct, the court is not persuaded that they have shown that they will suffer "irreparable harm," as that term is understood for the purposes of obtaining a stay in a rule challenge.

Having concluded that the counties have not shown that they will be irreparably injured in the absence of a stay, the court need not address the likelihood of harm to the public if a stay is granted.

For the reasons set forth above, the court concludes that it is not appropriate to grant a stay pending completion of judicial review. Accordingly, the counties' motion is denied.

Theresa Kidd
Appellate Commissioner
2/28/2025

c: Rob Bovett

Jane E Vetto

Inge D Wells

Caleb Huegel