OPINION NO. 98-01

Homeopathic Medical Examiners, State Board of; Homeopathic Medicine; Medical Examiners; Boards and Commissions; Administrative Law:

The Board of Medical Examiners may regulate the practice of its licensees even where that regulation may adversely affect the practice of licensees who are also licensed by the Board of Homeopathic Examiners.

Carson City, January 13, 1998

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Dear Dr. Royal:

You have asked four questions regarding the interrelationship of the Board of Homeopathic Examiners (BHE) and the Board of Medical Examiners (BME). In reading your request, your four questions could all be addressed through answering a single, reformulated question. We have, therefore, reformulated your questions into a single question, and our analysis of this question follows.

QUESTION

May the BME regulate licensees who are licensed by their board and also by BHE, even where the regulation by the BME may prohibit or effect practices that are condoned by the BHE?

ANALYSIS

Under NRS 630.020(1) the "practice of medicine" means: "To diagnose, treat, correct, prevent or prescribe for any human disease, ailment, injury, infirmity, deformity or other condition, physical or mental, by any means or instrumentality." NRS 630.130(2) empowers the BME to "adopt such regulations as are necessary or desirable to enable it [the BME] to carry out the provisions of this chapter." NRS 630.003 further states that "[t]he powers conferred upon the board by this chapter must be liberally construed to carry out this purpose [that only competent persons practice medicine within this state]."

NRS 630A.040 defined "homeopathic medicine" and "homeopathy" as follows:

"Homeopathic medicine" or "homeopathy" means a system of medicine employing substances of animal, vegetable, chemical or mineral origin, including nosodes and sarcodes, which are:
1. Given in micro-dosage, except that sarcodes may be given in macro-dosage;
2. Prepared according to homeopathic pharmacology by which the formulation of homeopathic preparations is accomplished by the methods of Hahnemannian dilution and succussion, magnetically energized geometric patterns, applicable in potencies above 30X as defined in the official Homeopathic Pharmacopoeia of the United States, or Korsakoffian; and
3. Prescribed by homeopathic physicians or advanced practitioners of homeopathy according to the medicines and dosages in the Homeopathic Pharmacopoeia of the United States, in accordance with the principle that a substance which produces symptoms in a healthy person can eliminate those symptoms in an ill person, resulting in the elimination and prevention of illness utilizing classical methodology and noninvasive electrodiagnosis.

NRS 630A.090(4) provides that "[t]his chapter does not authorize a homeopathic physician to practice medicine, including allopathic medicine, except as provided in NRS 630A.040."

The above statutes show a clear differentiation in scope of practice between the BME and the BHE. The use of broad language in NRS 630.020(1) evidences a legislative intent to grant practitioners within the BME's jurisdiction the broadest possible scope of practice. On the other hand, the specific language in NRS 630A.040 evidences a legislative intent to grant the practitioners within the BHE's jurisdiction a limited and delineated scope of practice. In fact, the language in NRS 630A.090(4) quoted above underscores that homeopathic practitioners are not authorized to practice allopathically and are, instead, limited to the scope of practice defined in NRS 630A.040.

NRS 630A.230(2)(c) mandates as a condition of licensure with the BHE that a practitioner be "licensed to practice allopathic or osteopathic medicine in any state or country, the District of Columbia or a territory or possession of the United States." We are aware that of the licensees of the BHE some are licensed by the BME, some are licensed by the Nevada Board of Osteopathic Examiners, and some are licensed by boards from other states or countries.

Because some licensees of the BHE are also licensed by the BME, our research focused on cases where one licensing board or professional association has challenged the statute or regulation of another licensing board as infringing on the authority of the first board or the practices of its licensees. The closest analogous case in Nevada was Natchez v. State, 102 Nev. 247, 721 P.2d 361 (1986). In Natchez, the Supreme Court examined whether an optometrist (regulated by the Nevada State Board of Optometry) can be employed by and share fees with an ophthalmologist (regulated by the BME). Based upon the plain language of NRS ch. 636 (relating to the Optometry Board), and even after finding that an ophthalmologist is not within the authority and jurisdiction of NRS ch. 636, the Supreme Court concluded that NRS 636.300(2) and (5) could prohibit an ophthalmologist from hiring and sharing fees with an optometrist. In so holding, the Court based its reasoning, in part, on the statutorily created
"distinction between optometrists and ophthalmologists for regulatory purposes: ophthalmologists are regulated by the Board of Medical Examiners and optometrists are regulated by the Board of Optometry." Natchez at 250.

In Christenot v. State, Dep't of Commerce, 901 P.2d 545 (Mont. 1995), the Montana Supreme Court reviewed regulations passed by that state's Dental Board that required a licensed denturist to refer his or her patient to a dentist before the denturist could make dentures for the patient. Using the well-established principle that "the construction of a statute by the agency responsible for its execution should be followed unless there are compelling indications that the construction is wrong" Id. at 548, the Montana Supreme Court vacated the trial court's injunction against the regulation because it found that the regulation as a whole did not add "provisions not envisioned by the legislature." Id. at 548-9.

In Washington State Nurses Assoc. v. Board of Medical Examiners, 605 P.2d 1269 (Wash. 1980), the Washington Supreme Court reviewed regulations by that state's Board of Medical Examiners that allowed physician's assistants to prescribe drugs under the supervision of a physician. The state's Nurses Association challenged this regulation as being beyond the scope of the Medical Examiners' authority, and the trial court agreed and ruled in favor of the Nurses Association. The Washington Supreme Court examined the statutes and regulations and reversed the trial court, finding that the regulations were precisely what the legislature intended when it created the statute authorizing physician's assistants and authorizing the Medical Examiners to regulate the use and practice of physician's assistants.

In Best v. Board of Dental Examiners, 423 S.E.2d 330 (N.C. Ct. App. 1992), the question was the correctness of the State Board of Dental Examiners' interpretation of the statute defining a nurse "legally qualified" to administer intraoral injections of anesthetic to include certified registered nurse anesthetists (CRNAs) where the State Board of Nursing objected and issued a contrary opinion. The trial court concluded that the Nursing Board had the authority to determine the definition of "lawfully qualified nurse" found in the Dental Board's statutes. The North Carolina Court of Appeals disagreed and reversed the trial court, reasoning as follows:

Nurses are regulated under Chapter 90, Article 9A, more commonly referred to as the Nursing Practice Act. Under these statuary provisions, the North Carolina Board of Nursing is empowered to "(1) [a]dminister this Article; (2) [i]ssue its interpretations of this Article; [and] (3) [a]dopt, amend or repeal rules and regulations as may be necessary to carry out the provisions of this Article." N.C.G.S. § 90-171.23(b) (1990) (emphasis added). The intraoral injection of anesthetic by lawfully qualified nurses is not a subject covered in the Nursing Practice Act, but instead is specifically provided for - and characterized as "dentistry" - in the Dental Practice Act. We do not believe our Legislature intended that one profession set the standards of qualification for another. The authority granted the Nursing Board is limited to the practices found in the Nursing Practice Act. (Emphasis supplied.)

Id. at 332-3. The Court of Appeals held that the Dental Board was the "correct agency to determine what kind of nurse qualifies as a 'lawfully qualified nurse' pursuant to N.C.G.S. § 90-29(b)(6) [the Dental Board's practice act]." Id. at 333.

In each of the above cases, the courts resolved the challenges by straightforward statutory analysis. Where the Legislature had given a specific board authority to regulate a given practice, the court deferred to the Legislature's direction, even where the regulation would affect licensees outside the regulatory authority of the board. In Natchez v. State, an ophthalmologist's practice was limited by the Optometry Board; in Christenot v. State, Dep't of Commerce, denturists' practices were drastically effected by the Dental Board; in Washington State Nurses Assoc. v. Board of Medical Examiners, nurses were ordered

to take orders from physician's assistants as a result of regulations by the Medical Examiners Board; and in Best v. Board of Dental Examiners, the term "lawfully qualified nurse" was allowed to be defined by the state's Dental Board, not the state's Nursing Board.

We think the analyses of the above cases are readily applicable to the question raised by this request. The core concern expressed throughout your request seems to be whether the BME may regulate the practice of people who are licensed by both itself and the BHE. In particular, you have expressed your concern with the BME's proposed regulation amendment to NAC 630.230, which will include the new language that a physician shall not :

(n) Prescribe or dispense Disodium Ethylene Diamine Telra Acetic Acid (EDTA) or use Chelation Therapy, except that the substance or the procedure, or both, may be used for the treatment of proven heavy metal poisoning or any other unusual or infrequent condition which the board finds warrants its use. The use of any procedure or substance which is prohibited by this subsection is harmful to the public, detrimental to the public health, safety and morals and constitutes unprofessional conduct.

This proposed new language is functionally identical to NAC 633.340(1)(c) by which the Board of Osteopathic Examiners has prohibited the use of EDTA and chelation therapy (with the same limited narrow exception) for osteopathic physicians since 1980. Our research shows that NAC 633.340(1)(c) has not been challenged in the 17 years it has been in force.

We must conclude that the BME's proposed restriction of the use of EDTA and chelation therapy for its practitioners is within the BME's statutory authority under NRS 630.130(2). Not only is the scope of practice governed by the BME the broadest possible under NRS 630.020(1), but equally broad is the scope of the BME's regulatory authority under NRS 630.130(2) because the BME is empowered "to adopt such regulations as are necessary or desirable to enable it [the BME] to carry out the provisions of this chapter." With such intentionally and expressly broad authority, we cannot say the regulation of a specific procedure or drug by the BME is outside the Legislature's intent.

The BME's proposed regulation seeks only to effect the practices of the BME's licensees. The BME would not have the authority to regulate the practices of homeopathic physicians any more that the BHE would have the authority to regulate the practices of allopathic physicians. Just as in the above cases, any incidental effect that the BME's regulation might have upon its licensees that are also licensed by the BHE cannot invalidate the regulations. To hold otherwise would be to give the BHE "veto power" over the BME's regulation of the BME's licensees. Such a "veto power" cannot be inferred and must, instead, be expressly made by the Legislature.

We are not deeming the BME "superior" (to use your word) to the BHE, but instead, we are merely acknowledging the system created and intended by the Legislature. The Legislature clearly intended to grant physicians the broadest possible scope of practice, and empowered the BME to regulate that broad practice as it deemed necessary and desirable. The Legislature clearly intended to require those people who wish to practice within the much narrower homeopathic methodology and modality to be licensed and regulated by the BHE. The choices of a few people to be licensees of both the BME and BHE cannot be allowed to sway the clear public policy enunciated by the Legislature.

You have raised section 1(4) of Statutes of Nevada, chapter 407 (1997) as indicative of a legislative intent to prohibit the BME from regulating practices that may be shared by both allopathy and homeopathy. Section 1(4) provides that the BHE will:

4. Investigate, hear and decide all complaints made against any homeopathic physician, advanced practitioner of homeopathy, homeopathic assistant or any agent or employee of any of them, or any facility where the primary practice is homeopathic medicine. If a complaint concerns a practice which is within the jurisdiction of another licensing board, including, without limitation, spinal manipulation, surgery, nursing or allopathic medicine, the board shall refer the complaint to the other licensing board.

Section 1(4) states the obvious: the BHE shall have disciplinary authority over its licensees, but where the complaint concerns dually licensed practitioners (such as nurses, chiropractors, allopathic physicians, or osteopathic physicians), the complaint must be referred to the board having jurisdiction over those practitioners. Thus, section 1(4) merely confirms our analysis that each board has jurisdiction and regulatory authority over its licensees independent of the jurisdiction and regulatory authority of other boards.

The end result of our analysis may well be that the BME could prohibit some practices that the BHE condones. In fact, this situation has existed for 17 years for those homeopathic physicians who are also licensed by the Board of Osteopathic Examiners. It may well be that the EDTA regulation would effect those few practitioners that are licensed by the BME and the BHE and who also use EDTA and chelation therapy, but this tangential effect in no way invalidates the BME's regulation or its authority to regulate its licensees as it deems necessary or desirable. Furthermore, with the advent of advanced practitioners of homeopathy, it is foreseeable that licensees of the BHE may also be licensees of the Board of Nursing or the Board of Chiropractic Examiners as well as licensees of the Board of Osteopathic Examiners and the BME.

Unless and until the Legislature says otherwise, we must conclude that each board has jurisdiction and regulatory authority over its licensees and that practitioners licensed by more than one board must comply with the statutes and regulations governing both of their licenses. If the statutes or regulations of two licensing boards conflict, a practitioner with two licenses will need to decide which practice to adhere to, cease the prohibited practice, or relinquish one of his or her licenses. These may be difficult alternatives, but they are the result of the Legislature's design.

CONCLUSION

The Board of Medical Examiners may regulate the practice of its licensees, and such regulation may prohibit practices for its licensees that are allowed by the Board of Homeopathic Examiners.

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4. The BME has regulated the use of other specific drugs and therapies. NAC 630.205 (regulating the use of certain drugs for weight loss); NAC 630.230(1)(g) (regulating the use of anabolic steroids); NAC 630.230(1)(j) (regulating the use of chorionic gonadotropic hormones, thyroid, and thyroid synthetics for weight loss).

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