May 12, 1997

OPINION NO. 97-028

Dorothy L. Fiorino, R.N., M.S.
Executive Director
Ohio Board of Nursing
77 South High Street, 17th Floor
Columbus, Ohio 43266-0316

Dear Executive Director Fiorino:

You have asked various questions concerning the authority of the Board of Nursing (Board) to investigate and enjoin the unauthorized practice of nursing by unlicensed individuals. The issues raised by your specific questions are as follows:

1. Does the Board have the authority to investigate unlicensed individuals who hold themselves out as nurses and unlicensed individuals who engage in the unauthorized practice of nursing?

2. If the Board is authorized to investigate the unauthorized practice of nursing by unlicensed individuals, may the Board in connection with such investigations subpoena witnesses and records, impose fines against unlicensed individuals, and enjoin the unauthorized practice of nursing by unlicensed individuals?

3. Does the Board have the authority to investigate, subpoena witnesses and records, and enjoin the unauthorized practice of nursing by unlicensed individuals who are employed as nursing aides, attendants, orderlies, or other auxiliary workers?

4. Does the Board have the authority to investigate, subpoena witnesses and records, and enjoin the unauthorized practice of nursing by employers who are not licensed by the Board when those employers require licensed nurse employees to perform nursing activities not authorized by the license issued the nurse employees by the Board?

5. Does the Board have the authority to investigate, subpoena witnesses and records, and enjoin the unauthorized practice of nursing by employers who are not

> licensed by the Board when those employers require licensed nurse employees to delegate nursing activities to unlicensed individuals and the licensed nurse employees have determined that such delegation is inappropriate?

Pursuant to R.C. 4723.06(A)(1), the Board of Nursing is required to administer and enforce the provisions of R.C. Chapter 4723, which pertains to the regulation of the practice of nursing. In order to discharge this duty, the Board is authorized to "investigate evidence that appears to show that any person has violated any provision of [R.C. Chapter 4723] or any rule of the [B]oard." R.C. 4723.28(E).

With respect to the unlicensed practice of nursing, R.C. 4723.03 provides, in part:

> (A) No person shall engage in the practice of nursing as a registered nurse, hold herself out as being a registered nurse, or use the title "registered nurse," the initials "R.N.," or any other title implying that the person is a registered nurse, for a fee, salary, or other consideration, or as a volunteer, without holding a current, valid license as a registered nurse under this chapter.
> (B) No person shall engage in the practice of nursing as a licensed practical nurse, hold herself out as being a licensed practical nurse, or use the title "licensed practical nurse," the initials "L.P.N.," or any other title implying that the person is a licensed practical nurse, for a fee, salary, or other consideration, or as a volunteer, without holding a current, valid license as a practical nurse under this chapter.
> (C) No person shall use the titles or initials "graduate nurse," G.N.," "professional nurse," "P.N.," "graduate practical nurse," "G.P.N.," "practical nurse," "P.N.," "trained nurse," "T.N.," or any other statement, title, or initials that would imply or represent to the public that the person is authorized to practice nursing in this state, except that a person licensed under this chapter to practice nursing as a registered nurse may use that title or the initials "R.N.," and a person licensed under this chapter to practice nursing as a licensed practical nurse may use that title or the initials "L.P.N."

The only pertinent exceptions to the prohibitions of R.C. 4723.03 are found in R.C. 4723.32 and 11 Ohio Admin. Code 4723-13-02.[1] R.C. 4723.32 states that R.C. Chapter 4723 does not prohibit the following:

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[1] Exceptions to the prohibitions of R.C. 4723.03 are also located in 11 Ohio Admin. Code Chapter 4723-21, which authorizes the delegation of nursing tasks to unlicensed individuals in county MR/DD facilities where sixteen or fewer individuals reside or facilities or programs of any size in which an individual attends for a portion of the day, and 11 Ohio Admin. Code Chapter 4723-22, which authorizes the delegation of nursing tasks to unlicensed individuals in intermediate care facilities for the mentally retarded with fifteen or fewer resident beds that are licensed as residential facilities under R.C. 5123.19 and certified as being in compliance with applicable standards for such facilities for purposes of the medical assistance program operated under R.C. Chapter 5111.

(A) The practice of nursing by students as an integral part of a program of study leading to initial licensure and approved by the board of nursing;
(B) The practice of nursing by a person currently licensed in another jurisdiction who is employed by the United States government or any agency thereof while in the discharge of official duties;
(C) The rendering of medical assistance to a licensed physician, licensed dentist, or licensed podiatrist by a person under the direction, supervision, and control of such licensed physician, dentist, or podiatrist;
(D) The activities of persons employed as nursing aides, attendants, orderlies, or other auxiliary workers in patient homes, nurseries, nursing homes, hospitals, home health agencies, or other similar institutions;
(E) The practice of nursing by any registered nurse or licensed practical nurse currently licensed in another jurisdiction who is employed by an individual, agency, or corporation located in that jurisdiction and whose employment responsibilities include transporting patients into, out of, or through this jurisdiction, so long as each trip does not exceed forty-eight hours in this state;
(F) The provision of nursing services to family members or in emergency situations;
(G) The care of the sick when done in connection with the practice of religious tenets of any church and by its members;
(H) The practice of nursing as a certified registered nurse anesthetist, clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner by a student as an integral part of a program of study leading to initial authorization by the board to practice nursing in the specialty, if the program qualifies the student to sit for the examination of a national certifying organization listed in division (A)(3) of section 4723.41 of the Revised Code or approved by the board under section 4723.46 of the Revised Code, or prepares the student to receive a master's degree in accordance with division (A)(2) of section 4723.41 of the Revised Code.

Rule 4723-13-02, which provides for the delegation of nursing tasks to unlicensed persons,[2] provides in relevant part:

Because your specific questions concern the authority of the Board to regulate the unauthorized practice of nursing by unlicensed individuals in general, this opinion will not consider the Board's authority to regulate such practice in facilities or programs governed by the provisions of Ohio Admin. Code Chapters 4723-21 and 4723-22. Accordingly, it is unnecessary in this opinion to examine the delegation provisions set forth in chapters 4723-21 and 4723-22 of the Ohio Administrative Code.

[2] Pursuant to R.C. 4723.02(B)(6), the practice of nursing as a registered nurse includes the delegation of nursing practice.

> (B) [Chapter 4723-13] authorizes a registered nurse to delegate a nursing task to a trained unlicensed person in accordance with this chapter.
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> ....
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> (D) This chapter authorizes a licensed practical nurse, at the direction of a registered nurse, to delegate to a trained unlicensed person, in accordance with this chapter, a basic nursing task within the licensed practical nurse's scope of practice. The licensed practical nurse shall not delegate to any unlicensed person the specific function or procedure set forth in paragraph (C)(4) of this rule, which has been delegated by the registered nurse to the licensed practical nurse.
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> (E) When delegation of a nursing task occurs in accordance with this chapter, the licensed nurse shall make the decision to delegate the nursing task, and shall be the only person who may delegate a nursing task. If an individual other than a licensed nurse delegates a nursing task, the individual delegating the nursing task shall be considered engaging in the unauthorized practice of nursing which is prohibited by section 4723.03 of the Revised Code.
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> ....
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> (G) Nothing in this chapter shall be construed to prevent any person from performing a task delegated to them by a person who is authorized by law to delegate that task.
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> (H) If any unlicensed person performs a nursing task and does not comply with all the provisions as set forth in this chapter, the unlicensed person shall be engaging in the unauthorized practice of nursing, which is prohibited by section 4723.03 of the Revised Code.

See 11 Ohio Admin. Code 4723-13-03(D); *see also* 11 Ohio Admin. Code 4723-13-05 (setting forth the criteria and standards for a registered nurse or licensed practical nurse to delegate nursing tasks to an unlicensed individual); 11 Ohio Admin. Code 4723-13-06 (providing the conditions and limitations on the authority of a registered nurse or licensed practical nurse to delegate nursing tasks to a trained unlicensed individual).

R.C. 4723.32 and rule 4723-13-02 thus set forth the specific instances in which an unlicensed individual may engage in the practice of nursing. Accordingly, except as provided in R.C. 4723.32 and rule 4723-13-02, R.C. 4723.03 prohibits an unlicensed individual from engaging in the practice of nursing or from holding herself out as a registered nurse, licensed practical nurse, graduate nurse, professional nurse, graduate practical nurse, practical nurse, trained nurse, or in any other way that would imply or represent to the public that the individual is licensed by the Board to practice nursing in this state.

Because R.C. 4723.28(E) authorizes the Board to investigate evidence that appears to show that an individual has violated a provision of R.C. Chapter 4723, the Board is authorized to investigate whether an individual is in violation of R.C. 4723.03. Therefore, pursuant to R.C. 4723.03 and R.C. 4723.28(E), the Board is authorized to investigate any unlicensed individuals who hold themselves out as nurses or engage in the unauthorized practice of nursing. *See, e.g., Garono v. State Bd. of Landscape Architect Examiners,* 35 Ohio St. 2d 44, 298 N.E.2d 565 (1973) (no person

may use the title "landscape architect" unless he is licensed pursuant to R.C. 4703.30-.49); *State v. Baylor*, 1 Ohio App. 3d 73, 439 N.E.2d 461 (Hamilton County 1981) (an individual is guilty of practicing medicine without a license, in violation of R.C. 4731.34 and R.C. 4731.41, when the evidence demonstrates that he used the title "M.D." after his name in a manner that induced a belief that he was actually engaged in medical practice).

The second issue to be discussed is whether the Board may, in connection with investigations pertaining to the unauthorized practice of nursing by unlicensed individuals, subpoena witnesses and records, impose fines against unlicensed individuals, and enjoin the unauthorized practice of nursing by unlicensed individuals. It is a well established rule that a creature of statute, like the Board, has only those powers expressly conferred upon it by the General Assembly or necessarily implied by such express powers. *See Burger Brewing Co. v. Thomas*, 42 Ohio St. 2d 377, 379, 329 N.E.2d 693, 695 (1975); *State ex rel. Copeland v. State Medical Bd.*, 107 Ohio St. 20, 140 N.E. 660 (1923); 1991 Op. Att'y Gen. No. 91-038 at 2-210; 1971 Op. Att'y Gen. No. 71-001 at 2-5.

R.C. 4723.29 authorizes the Board to subpoena witnesses or records. This section provides, in part:

> In addition to the powers conferred upon the board of nursing by Chapter 119. of the Revised Code, the board may subpoena witnesses and require their attendance, require the testimony of witnesses and require the production by witnesses of books, papers, public records, and other documentary evidence, and examine them as it may require *in relation to any matter which it has authority to investigate, inquire into, or hear*. (Emphasis added.)

This section permits the Board to subpoena witnesses and documents in any matter in which the Board has authority to investigate, inquire into, or hear. *See* 1979 Op. Att'y Gen. No. 79-085 at 2-275 (citing R.C. 4723.29 to support the proposition that "when the General Assembly has desired to give an administrative agency the power to subpoena records during an investigation, it has done so expressly"). As determined above, the Board has the authority to investigate evidence concerning the unauthorized practice of nursing by unlicensed individuals. Thus, pursuant to R.C. 4723.29, the Board may subpoena witnesses and records when investigating evidence pertaining to the unauthorized practice of nursing by unlicensed individuals.

Let us now consider the authority of the Board to impose fines against unlicensed individuals who engage in the unauthorized practice of nursing and to enjoin the unauthorized practice of nursing by unlicensed individuals. R.C. 4723.28(B)[3] authorizes the Board, pursuant to an

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[3] R.C. 4723.28(B) reads, in pertinent part, as follows:

> The board of nursing, pursuant to an adjudication conducted under Chapter 119. of the Revised Code and by a vote of a quorum, may impose one or more of the following sanctions: deny, revoke permanently, suspend, or place restrictions on any

adjudication conducted under R.C. Chapter 119 and by a vote of a quorum, to impose a fine of not more than five hundred dollars per violation against an individual licensed by the Board that the Board determines has violated one of the provisions of R.C. 4723.28(B)(1)-(25). R.C. 4723.28(B), however, authorizes the Board to impose fines against only individuals licensed by the Board. Neither R.C. 4723.28(B) nor any other provision of R.C. Chapter 4723 authorizes the Board to impose fines against unlicensed individuals the Board determines have violated R.C. 4723.03 by engaging in the unauthorized practice of nursing.

Instead, an individual who violates the provisions of R.C. 4723.03 is subject to the penalties set forth in R.C. 4723.99. This statute provides that "[w]hoever violates section 4723.03 ... of the Revised Code shall be fined five hundred dollars or imprisoned not more than ninety days or both." It is axiomatic that only courts vested with jurisdiction over criminal offenses may sentence an individual to a term of imprisonment or impose a monetary fine for those offenses. The penalties set forth in R.C. 4723.99 for a violation of R.C. 4723.03 thus must be imposed by a court of competent jurisdiction. Because "[i]t is one of the well recognized canons of statutory construction that when a statute directs a thing may be done by a specified means or in a particular manner it may not be done by other means or in a different manner," 1984 Op. Att'y Gen. No. 84-050 at 2-168, it follows that the General Assembly, through the enactment of R.C. 4723.99, has determined that only a court that determines that an unlicensed individual has engaged in the unauthorized practice of nursing may impose a fine against the individual. It is our opinion, therefore, that the Board is not permitted to impose fines against unlicensed individuals the Board determines have engaged in the unauthorized practice of nursing.

With respect to the authority of the Board to enjoin the unauthorized practice of nursing by unlicensed individuals, R.C. 4723.40 provides:

> In addition to any other remedies provided by law, the board of nursing may apply to an appropriate court for an order enjoining the violation of any provision of this chapter, and, upon a showing that any person has violated or is about to violate any provision of this chapter, the court shall grant an order enjoining such violation.

Pursuant to this statute, the Board is permitted to request an appropriate court for an order enjoining the violation of any provision of R.C. Chapter 4723. As stated above, except as provided in R.C. 4723.32 and rule 4723-13-02, R.C. 4723.03 prohibits an unlicensed individual from engaging in the practice of nursing. Therefore, pursuant to R.C. 4723.40, the Board may apply to an appropriate court for an order to enjoin the unauthorized practice of nursing by an unlicensed individual. *See generally* 1977 Op. Att'y Gen. No. 77-026 (pursuant to R.C. 4732.24, the State Board of Psychology is authorized to seek injunctive relief against persons engaged in the unauthorized practice of psychology).

> license or certificate issued by the board; reprimand or otherwise discipline a holder of a license or certificate; or impose a fine of not more than five hundred dollars per violation.

The third issue to be addressed is whether the Board has the authority to investigate, subpoena witnesses and records, and enjoin the unauthorized practice of nursing by unlicensed individuals who are employed as nursing aides, attendants, orderlies, or other auxiliary workers. As determined above, the Board is authorized to investigate any unlicensed individuals who engage in the unauthorized practice of nursing, *see* R.C. 4723.03; R.C. 4723.28(E), subpoena witnesses and records during the course of an investigation concerning the unauthorized practice of nursing by unlicensed individuals, R.C. 4723.29, and apply to an appropriate court for an order to enjoin the unauthorized practice of nursing by such individuals, R.C. 4723.40. However, R.C. 4723.32(D) provides that R.C. Chapter 4723 does not prohibit "[t]he activities of persons employed as nursing aides, attendants, orderlies, or other auxiliary workers in patient homes, nurseries, nursing homes, hospitals, home health agencies, or other similar institutions." You have indicated that it has been argued that R.C. 4723.32(D) excepts nursing aides, attendants, orderlies, or other auxiliary workers in patient homes, nurseries, nursing homes, hospitals, home health agencies, or other similar institutions from the provisions of R.C. 4723.03 that prohibit the unlicensed practice of nursing. In light of this argument, you specifically wish to know whether the language of R.C. 4723.32(D) permits unlicensed individuals who are employed as nursing aides, attendants, orderlies, or other auxiliary workers in patient homes, nurseries, nursing homes, hospitals, home health agencies, or other similar institutions to perform activities that constitute the practice of nursing.

An examination of R.C. 4723.32 in its entirety discloses that the General Assembly did not intend to permit unlicensed individuals who are employed as nursing aides, attendants, orderlies, or other auxiliary workers in patient homes, nurseries, nursing homes, hospitals, home health agencies, or other similar institutions to perform activities that constitute the practice of nursing. The language of R.C. 4723.32(D) states that R.C. Chapter 4723 does not prohibit "the *activities* of persons employed as nursing aides, attendants, orderlies, or other auxiliary workers in patient homes, nurseries, nursing homes, hospitals, home health agencies, or other similar institutions." (Emphasis added.) The General Assembly thus used the term "activities" to refer to those functions that may be performed by persons employed as nursing aides, attendants, orderlies, or other auxiliary workers in patient homes, nurseries, nursing homes, hospitals, home health agencies, or other similar institutions. R.C. 4723.32(D) makes no reference to the practice of nursing.

In contrast, R.C. 4723.32(A), (B), (E), and (H) specifically provide that R.C. Chapter 4723 shall not prohibit the practice of nursing by students, persons currently licensed in other jurisdictions and employed by the federal government, and persons currently licensed in other jurisdictions who transport patients into, out of, or through Ohio. The General Assembly has thus indicated the specific situations in which unlicensed individuals are authorized to engage in the practice of nursing. If the General Assembly had intended for unlicensed individuals who are employed as nursing aides, attendants, orderlies, or other auxiliary workers in patient homes, nurseries, nursing homes, hospitals, home health agencies, or other similar institutions to perform activities that constitute the practice of nursing, it could easily have communicated that intention expressly, having specifically listed the instances in which unlicensed individuals are authorized to engage in the practice of nursing. *See generally State ex rel. Boda v. Brown*, 157 Ohio St. 368, 372, 105 N.E.2d 643, 646 (1952) (express listing of a class of persons or things implies an exclusion of all others).

Accordingly, I find that R.C. 4723.32(D) is not intended to permit unlicensed individuals who are employed as nursing aides, attendants, orderlies, or other auxiliary workers in patient homes, nurseries, nursing homes, hospitals, home health agencies, or other similar institutions to perform activities that constitute the practice of nursing. Instead, the plain language of R.C. 4723.32 indicates that R.C. Chapter 4723 does not prohibit unlicensed individuals employed as nursing aides, attendants, orderlies, or other auxiliary workers in patient homes, nurseries, nursing homes, hospitals, home health agencies, or other similar institutions from performing those activities normally associated with the positions of nursing aide, attendant, orderly, or auxiliary worker that do not constitute the practice of nursing. Because no provision within R.C. Chapter 4723 authorizes individuals who are employed as nursing aides, attendants, orderlies, or other auxiliary workers in patient homes, nurseries, nursing homes, hospitals, home health agencies, or other similar institutions to perform activities that constitute the practice of nursing, the Board is authorized, pursuant to R.C. 4723.03, R.C. 4723.28(E), R.C. 4723.29, and R.C. 4723.40, to investigate, subpoena witnesses and records, and apply to an appropriate court for an order to enjoin the unauthorized practice of nursing by unlicensed individuals who are employed as nursing aides, attendants, orderlies, or other auxiliary workers.[4]

The fourth issue is whether the Board has the authority to investigate, subpoena witnesses and records, and enjoin the unauthorized practice of nursing by employers who are not licensed by the Board when those employers require licensed nurse employees to perform nursing activities not authorized by the license issued the nurse employees by the Board. R.C. 4723.03(E), which concerns the employment of unlicensed individuals as nurses, provides as follows:

> No person shall employ a person not licensed as a registered nurse under this chapter to engage in the practice of nursing as a registered nurse. No person shall employ a person not licensed as a practical nurse under this chapter to engage in the practice of nursing as a licensed practical nurse.

R.C. 4723.03(E) thus prohibits an employer from employing an individual to perform the duties of a registered nurse or licensed practical nurse unless the individual is licensed accordingly. Concomitantly, this provision prohibits an employer from requiring any employee to engage in the practice of nursing as a registered nurse or licensed practical nurse when the individual is not licensed as such by the Board.[5]

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[4] Pursuant to rule 4723-13-02, a registered nurse or licensed practical nurse may authorize an unlicensed individual who is employed as a nursing aide, attendant, orderly, or other auxiliary worker to perform a basic nursing task in accordance with the provisions of 11 Ohio Admin. Code Chapter 4723-13.

[5] The prohibition of R.C. 4723.03(E) is limited to the practice of nursing as a registered nurse and licensed practical nurse. Neither this section nor any other section prohibits an employer from employing an individual not holding a certificate of authority as a certified registered nurse anesthetist, clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner to engage

In addition, except as provided in R.C. 4723.32 and rule 4723-13-02, R.C. 4723.03(A) prohibits an unlicensed individual from engaging in the practice of nursing as a registered nurse. As defined in R.C. 4723.02(B)(6), the "practice of nursing as a registered nurse" includes the "delegating ... of nursing practice." Pursuant to rule 4723-13-02(E), a "licensed nurse shall make the decision to delegate the nursing task, and shall be the only person who may delegate a nursing task."[6] *See* rule 4723-13-03(F). An employer not licensed by the Board who delegates nursing tasks to either licensed or unlicensed employees engages in the practice of nursing as a registered nurse which is prohibited by R.C. 4723.03(A). *See* rule 4723-13-02(E); *see also* rule 4723-13-03(F).

In light of the foregoing, it follows that R.C. 4723.03 prohibits an employer who is not licensed by the Board from requiring a licensed nurse employee to perform a nursing task that is not authorized by the license issued the nurse employee by the Board. It remains, however, that a licensed nurse employee may, in some instances, be delegated, pursuant to Ohio Admin. Code Chapter 4723-13, nursing tasks for which she is not licensed. *See, e.g,,* rule 4723-13-02(C) (delegation of nursing tasks from a registered nurse to a licensed practical nurse). When a licensed nurse employee is delegated nursing tasks in accordance with 11 Ohio Admin. Code Chapter 4723-

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in the practice of nursing as a certified registered nurse anesthetist, clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner, respectively. Thus, it appears that an employer is not prohibited from requiring an employee to engage in the practice of nursing as a certified registered nurse anesthetist, clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner when the individual is not licensed as such by the Board, unless the conduct constitutes the practice of nursing as a registered nurse or licensed practical nurse.

On September 10, 1997, however, R.C. 4723.44(D) becomes effective. *See* Am. Sub. S.B. 154, 121st Gen. A. (1996) (eff. Sep. 10, 1996) (uncodified section six) (providing that R.C. 4723.44, as amended by Sub. S.B. 154, takes effect one year after the effective date of Sub. S.B. 154). R.C. 4723.44(D) states:

> No person shall knowingly employ a person to engage in the practice of nursing as a certified registered nurse anesthetist, clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner unless the person so employed holds a current, valid certificate of authority to engage in that nursing specialty issued by the board under this chapter.

Thus, as of September 10, 1997, an employer is prohibited from requiring an employee to engage in the practice of nursing as a certified registered nurse anesthetist, clinical nurse specialist, certified nurse-midwife, or certified nurse practitioner when the employee does not hold a certificate of authority to engage in that nursing specialty issued by the Board.

[6] For purposes of 11 Ohio Admin. Code Chapter 4723-13, the term "licensed nurse" is defined to mean "a registered nurse or a licensed practical nurse licensed to practice nursing in Ohio." 11 Ohio Admin. Code 4723-13-01(F).

13, an employer who is not licensed by the Board is not in violation of R.C. 4723.03 if he requires the nurse employee to perform such tasks. Accordingly, pursuant to R.C. 4723.03, an employer who is not licensed by the Board may not require a licensed nurse employee to engage in the practice of nursing as a registered nurse or licensed practical nurse unless the license issued to the nurse employee authorizes the nurse employee to engage in such practice or the nurse employee is delegated, pursuant to 11 Ohio Admin. Code Chapter 4723-13, the nursing tasks in question.

As stated above, R.C. 4723.28(E) authorizes the Board to investigate evidence that appears to show that an individual has violated R.C. 4723.03. Additionally, R.C. 4723.29 authorizes the Board to subpoena witnesses and documents in any matter in which the Board has authority to investigate, and R.C. 4723.40 permits the Board to apply to an appropriate court for an order enjoining the violation of R.C. 4723.03. These provisions, thus, authorize the Board to investigate, subpoena witnesses and records, and apply to an appropriate court for an order to enjoin the unauthorized practice of nursing by employers who are not licensed by the Board when those employers require a licensed nurse employee to engage in the practice of nursing as a registered nurse or licensed practical nurse when the license issued to the nurse employee does not authorize the nurse employee to engage in such practice or the nurse employee has not been delegated, pursuant to 11 Ohio Admin. Code Chapter 4723-13, the nursing tasks in question.[7]

The final issue to be addressed is whether the Board has the authority to investigate, subpoena witnesses and records, and enjoin the unauthorized practice of nursing by employers who are not licensed by the Board when those employers require licensed nurse employees to delegate nursing activities to unlicensed individuals and the licensed nurse employees have determined that such delegation is inappropriate. As indicated above, an employer not licensed by the Board is not permitted to delegate nursing tasks to unlicensed individuals. *See* R.C. 4723.03(A); rule 4723-13-02(E). Rather, a registered nurse or licensed practical nurse is required to make the decision whether to delegate a nursing task to an unlicensed individual. Rule 4723-13-02(E); *see* rule 4723-13-03(F). In this regard, rule 4723-13-05 provides, in part, as follows:

> (A) A licensed nurse may delegate a nursing task to a trained unlicensed person if all the conditions for delegation set forth in this chapter are met.
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> (C) When delegating a nursing task to a trained unlicensed person, the delegating nurse shall:
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> (1) Determine that the nursing task is within the scope of practice of a licensed nurse as set forth in section 4723.02 of the Revised Code;
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> (2) Determine that the nursing task is within the knowledge, skill, and ability of the nurse delegating the nursing task;
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> (3) Determine the conditions under which the trained unlicensed person may perform the nursing task;

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[7] In addition to any action the Board may take against an employer, the Board is also authorized by R.C. 4723.28 to discipline any licensee who engages in the unauthorized practice of nursing.

> (4) Specify the individual on whom the nursing task may be performed and specify a specific time frame during which this delegated nursing task may be performed;
> (5) In accordance with rule 4723-13-09 of the Administrative Code, determine the amount and extent of supervision required during the performance of the nursing task; and
> (6) Determine that supervision, as set forth in rule 4723-13-09 of the Administrative Code for the performance of the nursing task, is available.
> (D) Based on nursing knowledge, a licensed nurse shall make the decision to delegate a delegable nursing task to a trained unlicensed person. A nursing task is delegable if the licensed nurse delegating the task determines that all of the following apply:
> (1) The nursing task requires no judgment based on nursing knowledge and expertise on the part of the trained unlicensed person performing the task;
> (2) The results of the nursing task are reasonably predictable;
> (3) The nursing task can be safely performed according to exact, unchanging directions, with no need to alter the standard procedures for performing the task;
> (4) The performance of the nursing task does not require complex observations or critical decisions be made with respect to the nursing task;
> (5) The nursing task does not require repeated performance of nursing assessments; and
> (6) The consequences of performing the nursing task improperly are minimal and not life-threatening.

See rule 4723-13-06 (setting forth the conditions and limitations on the authority of a registered nurse or a licensed practical nurse to delegate nursing tasks to a trained unlicensed person); 11 Ohio Admin. Code 4723-13-07 (setting forth the requirements that must be satisfied before a trained unlicensed person may perform a delegated nursing task).

The discretion whether to delegate nursing tasks to individuals not licensed by the Board thus is vested solely with licensed nurses. If an employer not licensed by the Board requires a licensed nurse employee to delegate nursing tasks to an individual who is not licensed by the Board when the licensed nurse employee has determined that such delegation is inappropriate, the employer is exercising the discretion bestowed upon the licensed nurse employee. The employer, rather than the licensed nurse employee, would be delegating nursing tasks to an unlicensed individual. Because an employer not licensed by the Board is not permitted to delegate nursing tasks to unlicensed individuals, *see* R.C. 4723.03(A); rule 4723-13-02(E), an employer not licensed by the Board may not require licensed nurse employees to delegate nursing tasks to unlicensed individuals when the licensed nurse employee determines that the delegation of the nursing tasks is inappropriate. Inasmuch as R.C. 4723.03 prohibits this conduct on the part of employers who are not licensed by the Board, it is our conclusion, based on the discussion set forth above, that the Board is authorized to investigate, R.C. 4723.28(E), subpoena witnesses and records, R.C. 4723.29, and apply to an appropriate court for an order to enjoin, R.C. 4723.40, the unauthorized practice of nursing by employers who are not licensed by the Board when those employers require licensed

nurse employees to delegate nursing tasks to unlicensed individuals and the licensed nurse employees have determined that delegation of the nursing tasks is inappropriate.

Based on the foregoing, it is my opinion and you are hereby advised as follows:

1. Pursuant to R.C. 4723.03 and R.C. 4723.28(E), the Board of Nursing is authorized to investigate any unlicensed individuals who hold themselves out as nurses or engage in the unauthorized practice of nursing.

2. Pursuant to R.C. 4723.29, the Board of Nursing may subpoena witnesses and records when investigating evidence pertaining to the unauthorized practice of nursing by unlicensed individuals.

3. The Board of Nursing is not permitted to impose fines against unlicensed individuals the Board determines have engaged in the unauthorized practice of nursing.

4. Pursuant to R.C. 4723.40, the Board of Nursing may apply to an appropriate court for an order to enjoin the unauthorized practice of nursing by an unlicensed individual.

5. Pursuant to R.C. 4723.03, R.C. 4723.28(E), R.C. 4723.29, and R.C. 4723.40, the Board of Nursing is authorized to investigate, subpoena witnesses and records, and apply to an appropriate court for an order to enjoin the unauthorized practice of nursing by unlicensed individuals who are employed as nursing aides, attendants, orderlies, or other auxiliary workers.

6. Pursuant to R.C. 4723.03, R.C. 4723.28(E), R.C. 4723.29, and R.C. 4723.40, the Board of Nursing is authorized to investigate, subpoena witnesses and records, and apply to an appropriate court for an order to enjoin the unauthorized practice of nursing by employers who are not licensed by the Board when those employers require a licensed nurse employee to engage in the practice of nursing as a registered nurse or licensed practical nurse when the license issued to the nurse employee does not authorize the nurse employee to engage in such practice or the nurse employee has not been delegated, pursuant to 11 Ohio Admin. Code Chapter 4723-13, the nursing tasks in question.

7. Pursuant to R.C. 4723.03, R.C. 4723.28(E), R.C. 4723.29, and R.C. 4723.40, the Board of Nursing is authorized to investigate, subpoena witnesses and records, and apply to an appropriate court for an order to enjoin the unauthorized practice of nursing by employers who are not licensed by the Board when those employers require licensed nurse employees to delegate nursing tasks to unlicensed individuals and the licensed nurse employees have determined that delegation of the nursing tasks is inappropriate.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

May 12, 1997

Dorothy L. Fiorino, R.N., M.S.
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Ohio Board of Nursing
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SYLLABUS: 97-028

1. Pursuant to R.C. 4723.03 and R.C. 4723.28(E), the Board of Nursing is authorized to investigate any unlicensed individuals who hold themselves out as nurses or engage in the unauthorized practice of nursing.

2. Pursuant to R.C. 4723.29, the Board of Nursing may subpoena witnesses and records when investigating evidence pertaining to the unauthorized practice of nursing by unlicensed individuals.

3. The Board of Nursing is not permitted to impose fines against unlicensed individuals the Board determines have engaged in the unauthorized practice of nursing.

4. Pursuant to R.C. 4723.40, the Board of Nursing may apply to an appropriate court for an order to enjoin the unauthorized practice of nursing by an unlicensed individual.

5. Pursuant to R.C. 4723.03, R.C. 4723.28(E), R.C. 4723.29, and R.C. 4723.40, the Board of Nursing is authorized to investigate, subpoena witnesses and records, and apply to an appropriate court for an order to enjoin the unauthorized practice of nursing by unlicensed individuals who are employed as nursing aides, attendants, orderlies, or other auxiliary workers.

6. Pursuant to R.C. 4723.03, R.C. 4723.28(E), R.C. 4723.29, and R.C. 4723.40, the Board of Nursing is authorized to investigate, subpoena witnesses and records, and apply to an appropriate court for an order to enjoin the unauthorized practice of nursing by employers who are not licensed by the Board when those employers require a licensed nurse employee to engage in the practice of nursing as a registered nurse or licensed practical nurse when the license issued to the nurse employee does not authorize the nurse employee to engage in such practice or the nurse employee has not been delegated, pursuant to 11 Ohio Admin. Code Chapter 4723-13, the nursing tasks in question.

7. Pursuant to R.C. 4723.03, R.C. 4723.28(E), R.C. 4723.29, and R.C. 4723.40, the Board of Nursing is authorized to investigate, subpoena witnesses and records, and apply to an appropriate court for an order to enjoin the unauthorized practice of nursing by employers who are not licensed by the Board when those employers require licensed nurse employees to delegate nursing tasks to unlicensed individuals and the licensed nurse employees have determined that delegation of the nursing tasks is inappropriate.