February 25, 2000

OPINION NO. 2000-016

Christopher H. Logsdon, R.C.P.
Executive Secretary
Ohio Respiratory Care Board
77 South High Street, 18th Floor
Columbus, Ohio 43266-0777

Dear Executive Secretary Logsdon:

You have requested an opinion concerning the performance or delegation of respiratory care by nurses. Your letter states, in pertinent part, that:

> While it is understood that the scope of practices for registered nurses and respiratory therapists overlap, it is less clear whether that overlap containing respiratory care may be delegated by a nurse to an unlicensed individual. A question arises as to whether unlicensed individuals may provide such care if authorized to do so by a registered nurse pursuant to [R.C. 4723.02(B)(6)] and in accordance with Chapter 4723-13 of the Ohio Administrative Code.

You, therefore, ask:

1. Given the prohibitions set forth in [R.C. 4761.10] and the exceptions set forth in [R.C. 4761.11], may a registered nurse delegate respiratory care in a hospital, excluding medication administration, to an unlicensed individual pursuant to [R.C. 4723.02(B)(6)] and in accordance with Chapter 4723-13 of the Ohio Administrative Code?

2. Using the same references and parameters, may a registered nurse delegate respiratory care tasks and activities to an unlicensed individual in a non-hospital environment?

3. Are the examples of delegable tasks stated in [R.C. 4761.10] (i.e., measuring blood pressure and taking blood samples) the only tasks that may be delegated by a nurse?

4. If the examples of delegable tasks stated in [R.C. 4761.10] may be expanded to include other respiratory care tasks, must the task be related to the examples provided with regard to complexity? To state this another way, must they be similar in nature[?][1]

5. Is it the responsibility of the Ohio Respiratory Care Board to further identify o[r] define tasks that may be regard[ed] as "limited aspects" of respiratory care by rule or may any individual, organization, or agency define those aspects that they deem to be limited and therefore delegable?

In order to answer your questions it is first necessary to examine the authority of the Ohio Respiratory Care Board. R.C. 4761.03 describes the powers and duties of the Ohio Respiratory Care Board, in part, as follows:

> The Ohio Respiratory Care Board *shall regulate the practice of respiratory care*[2] under this chapter….

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[1] Because you have not inquired about the delegation of nursing tasks to a licensed practical nurse or in a mental retardation and developmental disabilities or other non-health care services facility, this opinion will not address these particular circumstances, all of which are governed by special provisions of law. *See, e.g.*, R.C. 4723.61 (rules for delegation by nurses to workers in facilities for mentally retarded of authority to administer medications); R.C. 4723.62 (delegation by nurses to county mental retardation board workers of authority as to medication and nursing tasks); 11 Ohio Admin. Code 4723-13-04 (delegation to a licensed practical nurse); 11 Ohio Admin. Code 4723-13-09 (supervision of delegated nursing tasks performed by a trained unlicensed person). Instead, this opinion will speak generally of the tasks, other than medication administration, that a registered nurse may delegate to an unlicensed person outside the setting of a mental retardation and developmental disabilities or other non-health care services facility.

[2] As used in R.C. 4761.01-.12, "respiratory care" means:

> rendering or offering to render to individuals, groups, organizations, or the public any service involving the evaluation of cardiopulmonary function, the treatment of cardiopulmonary impairment, the assessment of treatment effectiveness, and the care of patients with deficiencies and abnormalities associated with the cardiopulmonary system, *performed upon the prescription and under the supervision of a physician*

> The board *shall*:
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> (A) *Adopt*, and may rescind or amend, *rules* in accordance with [R.C. Chapter 119] *to carry out the purposes of this chapter*…
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> ….
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> (E) *Investigate complaints concerning alleged violations of [R.C. 4761.10]* or grounds for the suspension, revocation, or refusal to issue licenses or limited permits under [R.C. 2301.373 or R.C. 4761.09][3]….
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> ….
>
> (F) Conduct hearings, keep records of its proceedings, and do all such other things as are necessary and proper to carry out and enforce the provisions of this chapter…. (Emphasis and footnote added.)

Pursuant to R.C. 4761.03, it is thus the Ohio Respiratory Care Board's duty to regulate the practice of respiratory care and to investigate alleged violations of R.C. 4761.10, which, in part, prohibits the unauthorized practice of respiratory care.

Let us now turn to your first question, which asks, "[g]iven the prohibitions set forth in [R.C. 4761.10] and the exceptions set forth in [R.C. 4761.11], may a registered nurse delegate respiratory care in a hospital, excluding medication administration, to an unlicensed individual pursuant to [R.C. 4723.02(B)(6)] and in accordance with Chapter 4723-13 of the Ohio Administrative Code?" Because

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> licensed under [R.C. Chapter 4731] to practice medicine and surgery or osteopathic medicine and surgery. The practice of respiratory care includes…
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> …
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> (4) Administering medications for the testing or treatment of cardiopulmonary impairment upon the prescription and under the supervision of a physician licensed under [R.C. Chapter 4731] to practice medicine and surgery or osteopathic medicine and surgery.

R.C. 4761.03(A) (emphasis added). Because you have excluded the delegation of medication administration from the tasks about which you ask, this opinion will not address the performance or delegation of this aspect of respiratory care.

[3] R.C. 2301.373 concerns the denial or suspension of occupational or professional licenses or refusal to renew due to child support default or failure to attend support proceedings. R.C. 4761.09 governs disciplinary actions by the Ohio Respiratory Care Board.

the issues are so closely related, we will at the same time address your second question concerning the delegation of such tasks outside a hospital setting.[4]

In order to answer this question, we must begin by examining R.C. 4761.10(A), which creates the prohibition that the Ohio Respiratory Care Board has a duty to enforce and states, in pertinent part:

> *No person shall offer or render respiratory care services, or hold himself out as being* a respiratory care professional, respiratory therapist, respiratory technologist, respiratory care technician, respiratory practitioner, inhalation therapist, inhalation technologist, or inhalation therapy technician, or as having any similar title or as providing these services under a similar description, *unless the person holds a license or limited permit issued under this chapter*…. (Emphasis added.)

R.C. 4761.10(A) thus establishes the basic prohibition against a person's offering or rendering respiratory care or holding oneself out as a provider of respiratory care without a license or limited permit issued under R.C. Chapter 4761.[5]

There are, however, various exceptions to the prohibition contained in the first paragraph of R.C. 4761.10(A). For example, the second paragraph of R.C. 4761.10(A) reads, as follows:

> Notwithstanding the provisions of this division, *some limited aspects of respiratory care services* such as measuring blood pressure and taking blood samples *may also be performed in a hospital* meeting the operating standards of [R.C. 3727.02 (certification or accreditation requirements for hospitals)] *by persons demonstrating current competence in such procedures* under the direction of a physician authorized under [R.C. Chapter 4731] to practice medicine and surgery or osteopathic medicine and surgery or *under the direction of a registered nurse licensed under [R.C. Chapter 4723]*, so long as such person does not hold himself

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[4] The Attorney General's duty under R.C. 109.12 to advise state officers and boards extends only to "matters relating to their official duties." This opinion, therefore, will discuss the practice of nursing only as it relates to the Ohio Respiratory Care Board's regulation of respiratory care. *See* 1998 Op. Att'y Gen. No. 98-003 at 2-15 n.1.

[5] The prohibition created by R.C. 4761.10(A) is enforced by the Ohio Respiratory Care Board pursuant to R.C. 4761.10(B), which authorizes the Ohio Respiratory Care Board to apply to an appropriate court for an order restraining any activity that is prohibited by R.C. 4761.10(A) or that is grounds for the denial, suspension, or revocation of a license under R.C. 4761.09. *See generally* R.C. 4761.99 ("[w]hoever violates [R.C. 4761.10(A)] is guilty of a minor misdemeanor on a first offense. On a second offense, the person is guilty of a misdemeanor of the fourth degree. On each subsequent offense, the person is guilty of a misdemeanor of the first degree").

> out as being engaged in the practice of respiratory care. The above limited aspects of respiratory care do *not* include any of the following: the administration of aerosol medication, the maintenance of patients on mechanical ventilators, aspiration, and the application and maintenance of artificial airways. (Emphasis added.)

The second paragraph of R.C. 4761.10(A) thus excludes from the unauthorized practice of respiratory care the performance of "limited aspects of respiratory care services such as measuring blood pressure and taking blood samples" by a competent person, but only if such services are rendered under the direction of a licensed physician or a licensed registered nurse in a hospital meeting the operating standards of R.C. 3727.02 and if the person rendering the services does not hold himself out as being engaged in the practice of respiratory care.

Apart from the prohibition against the unauthorized practice of respiratory care and the exceptions therefrom in R.C. 4761.10, we must also consider R.C. 4761.11, which states, in pertinent part:

> (A) *Nothing in this chapter shall be construed to prevent or restrict the practice, services, or activities of any person who*:
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> (1) Is a physician authorized under [R.C. Chapter 4731] to practice medicine and surgery or osteopathic medicine and surgery; is employed in the office of such a physician and who renders medical assistance under the physician's direct supervision but who does not hold himself out as being engaged in the profession of respiratory care; *is a registered nurse licensed under [R.C. Chapter 4723]*; or is any other health care professional licensed by this state, practicing within the scope of practice established by the license held, but who does not hold himself out as being engaged in the practice of respiratory care; [or]
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> …
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> (10) *Provides limited aspects of respiratory care pursuant to [R.C. 4761.10(A)] in a hospital* meeting the operating standards of [R.C. 3727.02] *under the direction* of a physician authorized under [R.C. Chapter 4731] to practice medicine and surgery or osteopathic medicine and surgery or *of a registered nurse licensed under [R.C. Chapter 4723]* so long as such person does not hold himself out as being engaged in the practice of respiratory care. (Emphasis added.)

The exceptions appearing in R.C. 4761.11 are much broader than the exception created by the second paragraph of R.C. 4761.10(A). Whereas the second paragraph of R.C. 4761.10(A) creates an exception only to the prohibition contained in the first paragraph of R.C. 4761.10(A), R.C. 4761.11 exempts from the restrictions and prohibitions of all of R.C. Chapter 4761, the "practice, services, or activities" of ten categories of persons. Nine of such categories comprise persons who either possess licenses or certificates to practice in fields other than respiratory care, *e.g.*, licensed registered nurses. The final category of persons whose services and activities are not restricted by R.C. Chapter 4761 are

those persons described in R.C. 4761.11(A)(10), *i.e.*, those persons who provide limited aspects of respiratory care in accordance with R.C. 4761.10(A).

Of particular importance to the issues you raise is R.C. 4761.11(A)(1), which excepts from the prohibitions and restrictions of all of R.C. Chapter 4761 the "practice, services, or activities" of, among others, a registered nurse licensed under R.C. Chapter 4723. As mentioned in your request, the questions you ask arise from the fact that the performance of certain tasks falls within both the practice of nursing as a registered nurse and the practice of respiratory care.[6] Because of the identity of certain tasks within these professions, you question whether the regulatory authority of the Ohio Respiratory Care Board extends to the performance of particular tasks that fall within the practice of nursing as a registered nurse, as well as the practice of respiratory care, in situations where such tasks are delegated to an unlicensed individual by a licensed registered nurse in accordance with R.C. 4723.02(B)(6) and 11 Ohio Admin. Code Chapter 4723-13.

Let us begin by examining more closely R.C. 4761.11(A)(1), which provides in pertinent part, that nothing in R.C. Chapter 4761 "shall be construed to prevent or restrict the practice, services, or activities of any person who … is a registered nurse licensed under [R.C. Chapter 4723]." Accordingly, if the activity you describe, *i.e.*, the delegation to an unlicensed person of tasks that fall within the practice of respiratory care, excluding medication administration, whether or not in a hospital, is within the "practice, services, or activities" of a registered nurse licensed under R.C. Chapter 4723, such activity is not, pursuant to R.C. 4761.11(A)(1), subject to prevention or restriction by R.C. Chapter 4761.

In order to understand the role of delegation of tasks as part of nursing practice, we must examine the meaning of the phrase, "[p]ractice of nursing as a registered nurse," which is defined as meaning, "providing to individuals and groups nursing care requiring specialized knowledge, judgment, and skill derived from the principles of biological, physical, behavioral, social, and nursing sciences." R.C. 4723.02(B). Expressly included within the nursing care provided by a registered nurse are

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[6] It is beyond the scope of an Attorney General opinion to determine whether there are tasks that fall within the practice of respiratory care and also within the practice of nursing as a registered nurse. *See generally* R.C. 4761.01(A) (defining "respiratory care" for purposes of R.C. Chapter 4761); R.C. 4723.02(B) (defining the "[p]ractice of nursing as a registered nurse" for purposes of R.C. Chapter 4723). Those matters are better resolved by the Ohio Respiratory Care Board and the Board of Nursing to whose expertise the General Assembly has delegated the regulation of the respective practices. *See Blue Cross v. Ratchford*, 64 Ohio St. 2d 256, 260, 416 N.E.2d 614, 618 (1980) ("[o]rdinarily, the establishment of standards can be left to the administrative body or officer if it is reasonable for the General Assembly to defer to the officer's or body's expertise"). We will assume, however, for purposes of discussion, that certain respiratory care tasks also fall within the practice of nursing as a registered nurse.

"[t]eaching, administering, supervising, *delegating*, and evaluating nursing practice."[7] R.C. 4723.02(B)(6) (emphasis added). *See* 1997 Op. Att'y Gen. No. 97-028 at 2-164 n.2; 11 Ohio

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[7] The criteria and standards for the delegation of a nursing task by a licensed nurse to an unlicensed person outside of a mental retardation and developmental disabilities facility are prescribed, in part, by 11 Ohio Admin. Code 4723-13-05, which states:

> (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*.
>
> (B) Prior to the delegation of any nursing task, *a registered nurse shall complete an assessment of the conditions which relate to the delegation* of the nursing task to be performed. The assessment shall include:
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> (1) An assessment of the individual who needs nursing care;
>
> (2) The types of nursing care the individual requires;
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> (3) The complexity and frequency of the nursing care needed;
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> (4) The stability of the individual who needs nursing care;
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> (5) A review of the assessments performed by other licensed health care professionals;
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> (6) *The training, ability, and skill of the trained unlicensed person who will be performing the delegated nursing task*;
>
> (7) The nature of the nursing task being delegated; and
>
> (8) The availability and accessibility of resources.
>
> *A delegable nursing task may be delegated to a trained unlicensed person only if the assessment indicates that the requirements established in this chapter have been or can be met*.
>
> (C) *When delegating a nursing task to a trained unlicensed person, the delegating nurse shall*:
>
> (1) *Determine that the nursing task is within the scope of practice of a licensed nurse as set forth in [R.C. 4723.02]*,
>
> (2) Determine that the nursing task is within the knowledge, skill, and ability of the nurse delegating the nursing task;
>
> (3) Determine the conditions under which the trained unlicensed person may perform the nursing task;
>
> (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

Admin. Code 4723-13-02(B) (stating, "[t]his chapter authorizes a registered nurse to delegate a nursing task to a trained unlicensed person in accordance with this chapter").[8] Thus, by definition, the

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> (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.
>
> (E) A licensed nurse shall not be responsible for the delegation by another licensed health care practitioner to an unlicensed person. (Emphasis added.)

See also 11 Ohio Admin. Code 4723-13-03 (prohibitions against delegation); 11 Ohio Admin. Code 4723-13-06 (conditions and limitations on the authority of the licensed nurse to delegate to a trained unlicensed person); 11 Ohio Admin. Code 4723-13-08 (minimum curriculum requirements for teaching a delegable nursing task); 11 Ohio Admin. Code 4723-13-09 (on-site or indirect supervision of the performance of a delegable nursing task performed by a trained unlicensed person).

[8] 11 Ohio Admin. Code 4723-13-01 defines certain terms, as used in 11 Ohio Admin. Code Chapter 4723-13, in part, as follows:

> (C) "Delegation" means the transfer of responsibility for the performance of a selected nursing activity or task from a licensed nurse authorized to perform the activity or task to an individual who does not have the authority to perform the activity or task.
>
> (D) "Delegable nursing task" means a nursing task which a licensed nurse has determined meets the provisions listed in paragraph (D) of rule 4723-13-5 [4723-13-05] of this chapter.
>
> (F) "Licensed nurse" means a registered nurse or a licensed practical nurse licensed to practice nursing in Ohio.

delegation of nursing practice, like the actual administration of nursing care, is part of the "[p]ractice of nursing as a registered nurse." Whether or not a particular nursing task is also a respiratory care task, the delegation of such nursing task by a licensed registered nurse is part of the practice of nursing, which, pursuant to R.C. 4761.11(A)(1), is not subject to the restrictions and prohibitions of R.C. Chapter 4761.[9]

In order to understand the application of the exception created by R.C. 4761.11(A)(1) as it relates to the delegation of a nursing task that also constitutes a respiratory care task, we must consider the meaning of the term "delegation." Pursuant to 11 Ohio Admin. Code 4723-13-01(C), the word "[d]elegation," as used in 11 Ohio Admin. Code Chapter 4723-13, means "the transfer of responsibility for the performance of a selected nursing activity or task from a licensed nurse authorized to perform the activity or task to an individual who does not have the authority to perform the activity or task." By definition, the act of delegation requires two persons – one who delegates and one to whom something is delegated. *See generally Webster's Third New International Dictionary* 596 (unabridged ed. 1993) (defining "delegate," in part, as meaning "to entrust to another"). Because, pursuant to R.C. 4761.11(A)(1), nothing in R.C. Chapter 4761 prevents or restricts the "practice, services, or activities" of a licensed registered nurse, including the delegation of nursing tasks in accordance with 11 Ohio Admin. Code Chapter 4723-13, neither the nurse who so delegates nor the person to whom such a nursing task is delegated is subject to the restrictions or prohibitions of R.C. Chapter 4761, even if such task also falls within the practice of respiratory care.

You specifically question whether the second paragraph of R.C. 4761.10(A) limits the exception created by R.C. 4761.11(A)(1) such that a licensed registered nurse may delegate to an

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> ….
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> (H) "Trained unlicensed person" means an individual, not currently licensed by the board as a registered nurse or licensed practical nurse, who has been taught by a licensed nurse in accordance with paragraph (A) of rule 4723-13-08 of this chapter to perform a nursing task under the supervision of a licensed nurse.
>
> (I) "Unlicensed person" means an individual not currently licensed by the board as a registered nurse or licensed practical nurse.

[9] According to 11 Ohio Admin. Code 4723-13-05(D), *see* note six, *supra*, whether a licensed nurse may delegate a particular task to a trained unlicensed person is a determination that must be made by the nurse on a case-by-case basis, after evaluating all the factors described in that rule, including an evaluation of the patient's condition and the ability of the person to whom the task will be delegated, and subject to the prohibitions, conditions, and limitations set forth in 11 Ohio Admin. Code Chapter 4723-13. It is not possible, therefore, to compile a list of nursing tasks that a nurse may delegate under 11 Ohio Admin. Code Chapter 4723-13, the nature of the task being only one factor in determining whether a nurse may delegate that task in a particular situation.

unlicensed person a nursing task, such as measuring blood pressure or taking a blood sample, that also constitutes a limited aspect of respiratory care for purposes of R.C. 4761.10(A), only in the limited circumstances described in the second paragraph of R.C. 4761.10(A). Further, you question whether the second paragraph of R.C. 4761.10(A) absolutely prohibits a licensed registered nurse from delegating to an unlicensed person a nursing task that also happens to be a respiratory care task other than one of the limited tasks referred to in R.C. 47610.10(A). For the reasons that follow, however, we do not find the second paragraph of R.C. 4761.10(A) to so limit the exception created by R.C. 4761.11(A)(1).

We must first note that, pursuant to R.C. 4761.99, *see* note four, *supra*, R.C. 4761.10 is a penal statute. The application of R.C. 4761.10 to the practice of nursing as a registered nurse would operate as a restraint on the practice of that profession. With respect to the interpretation of a statute of this type, it is well settled that:

> *Statutes* or ordinances *of a penal nature, or which restrain the exercise of any* trade or *occupation* or the conduct of any lawful business, or which impose restrictions upon the use, management, control or alienation of private property, will be strictly construed and their scope cannot be extended to include limitations not therein clearly prescribed; *exemptions from such restrictive provisions are for like reasons liberally construed*. (Emphasis added.)

State ex rel. Moore Oil Co. v. Dauben, 99 Ohio St. 406, 124 N.E. 232 (1919) (syllabus, paragraph one). Thus, any exception to the prohibition contained in the first paragraph of R.C. 4761.10(A), including the exception found in R.C. 4761.11(A)(1), regarding the practice, services, and activities of licensed registered nurses, must be liberally construed.

If the second paragraph of R.C. 4761.10(A) were read as setting forth the only circumstances in which a licensed registered nurse could delegate a nursing task that also falls within the practice of respiratory care, the provisions of R.C. 4761.10(A) would restrict the practice, services, or activities of a licensed registered nurse by limiting the extent to which a licensed registered nurse may delegate nursing tasks. Such a reading of R.C. 4761.10(A) would be inconsistent with a liberal reading of the exceptions from the prohibition contained therein. Because the delegation of nursing care is part of the practice of nursing as a registered nurse, such delegation is neither subject to the prohibition contained in R.C. 4761.10(A) nor restricted or prohibited by any other provision in R.C. Chapter 4761.

Part of your first two questions concerns the delegation of nursing tasks within or outside a hospital setting. The issue as to the setting in which a nurse may delegate a nursing task that is also a respiratory care task appears to be based upon the assumption that the second paragraph of R.C. 4761.10(A) limits to the setting described therein, *i.e.*, a hospital meeting the standards of R.C. 3727.02, the instances in which a nurse may delegate a nursing task that also constitutes a respiratory care task. Based upon the conclusion that the prohibition contained in R.C. 4761.10(A) has no

application to the delegation of nursing tasks by a registered nurse, the Ohio Respiratory Care Board has no regulatory authority regarding the setting in which such delegation may occur. Rather, the setting in which a registered nurse may delegate a nursing task is subject to regulation by the Board of Nursing.[10]

In answer to your first two questions, we conclude, therefore, that R.C. 4761.11(A)(1) excepts from the restrictions and prohibitions of R.C. Chapter 4761 the practice, services, or activities of a licensed registered nurse, including the delegation of nursing tasks in accordance with 11 Ohio Admin. Code Chapter 4723-13, in any setting other than a county mental retardation and developmental disabilities facility, even if such tasks also fall within the practice of respiratory care, as defined in R.C. 4761.01(A).

Your third and fourth questions ask whether "the examples of delegable tasks stated in [R.C. 4761.10] (i.e., measuring blood pressure and taking blood samples) [are] the only tasks that may be delegated by a nurse," and, if not, whether other delegable tasks must be similar to the examples provided with regard to complexity. These questions assume that the only tasks that fall within the practice of respiratory care that a licensed nurse may delegate are the "limited aspects of respiratory care services" mentioned in R.C. 4761.10(A). Because we have concluded, however, that, R.C. 4761.10(A) does not limit the tasks a licensed nurse may delegate within the practice of nursing, whether or not such tasks also fall within the practice of respiratory care, we cannot answer your third and fourth questions as posed. We may, nonetheless, advise you more generally as to the meaning of the phrase "limited aspects of respiratory care services," as used in R.C. 4761.10(A), in order to assist you in determining which tasks, other than those expressly identified, constitute "limited aspects of respiratory care services" that fall outside the scope of your regulatory authority.

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[10] As provided by 11 Ohio Admin. Code 4723-13-02(A):

> [11 Ohio Admin. Code Chapter 4723-13] shall apply to *all settings* where nursing care is rendered *except* an MR/DD county board facility as set forth in rule 4723-21-02 of the Administrative Code. The MR/DD county board facility shall comply with Chapter 4723-21 of the Administrative Code with regards to the delegation of a nursing task. (Emphasis added.)

Accordingly, rule 4723-13-02(A) authorizes a registered nurse to delegate a nursing task to an unlicensed person in accordance with 11 Ohio Admin. Code Chapter 4723-13 in all settings where nursing care is rendered except in a county mental retardation and developmental disabilities facility. The regulations governing the practice of nursing as a registered nurse do not, therefore, distinguish between hospital and non-hospital settings, other than MR/DD county board facilities.

In describing the limited aspects of respiratory care services, the performance of which does not constitute the unauthorized practice of respiratory care for purposes of R.C. 4761.10(A), the General Assembly has used the words "such as," followed by "measuring blood pressure and taking blood samples." The General Assembly's modification of the phrase "limited aspects of respiratory care services" with the words "such as" indicates that those tasks listed are not the only tasks that constitute limited aspects of respiratory care to which the prohibition contained in the first paragraph of R.C. 4761.10(A) does not apply. Rather the tasks listed are only examples of the types of tasks that constitute "limited aspects of respiratory care services." *See Charles Behlen Sons' Co. v. Ricketts*, 30 Ohio App. 167, 176, 164 N.E. 436, 439 (Hamilton County 1928) ("the phrase 'such as' should be here construed to mean 'similar to;' that the list of specified examples ... should not be regarded as a complete or exhaustive catalogue"); 1985 Op. Att'y Gen. No. 85-100 at 2-243 ("use of the words 'such as' indicates that other similar types ... may also be included"). *See generally Webster's Third New International Dictionary* 2283 (unabridged ed. 1993) (defining "such" as meaning, in part, "of a kind or character about to be indicated, suggested, or exemplified").

It follows, therefore, that it is within the discretion of the Ohio Respiratory Care Board to determine which other tasks, similar to measuring blood pressure and taking blood samples, constitute limited respiratory care services for purposes of R.C. 4761.10(A).[11] *See State ex rel. McLean v. Industrial Comm'n*, 25 Ohio St. 3d 90, 92, 495 N.E.2d 370, 372 (1986) ("courts, when interpreting statutes, must give due deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, and to which the legislature has delegated the responsibility of implementing the legislative command").

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[11] Although your questions ask whether the term "limited aspects of respiratory care," as used in R.C. 4761.10(A), is subject to "expansion" by rule by the Ohio Respiratory Care Board, we must bear in mind that, "[w]here by statutory authority an administrative agency … promulgates rules and regulations governing its activities and procedure, such rules are valid and enforceable unless they are unreasonable or in conflict with statutory enactments covering the same subject matter." *State ex rel. DeBoe v. Industrial Comm'n*, 161 Ohio St. 67, 117 N.E.2d 925 (1954) (syllabus, paragraph one). Thus, the Ohio Respiratory Care Board may not expand the scope of the "limited aspects of respiratory care" referred to in R.C. 4761.10(A) beyond those that are similar to measuring blood pressure and taking blood samples. Moreover, the General Assembly has expressly limited the scope of "limited aspects of respiratory care services" for purposes of R.C. 4761.10(A) by providing that such services "*do not include* any of the following: the administration of aerosol medication, the maintenance of patients on mechanical ventilators, aspiration, and the application and maintenance of artificial airways." R.C. 4761.10(A) (emphasis added). Thus, in determining what tasks are similar in nature to measuring blood pressure and taking blood samples, and, therefore, constitute other "limited aspects of respiratory care services" for purposes of R.C. 4761.10(A), the Ohio Respiratory Care Board may not include the administration of aerosol medication, the maintenance of patients on mechanical ventilators, aspiration, and the application and maintenance of artificial airways.

Your final question asks whether it is the responsibility of the Ohio Respiratory Care Board to further identify or define, by rule, tasks that may be regarded as "limited aspects" of respiratory care or whether any individual, organization, or agency may define those aspects that they deem to be limited and therefore delegable.[12] The focus of this question appears to be whether the Ohio Respiratory Care Board or some other person or entity is authorized to define the tasks, other than measuring blood pressure and taking blood samples, that constitute "limited aspects of respiratory care services" for purposes of R.C. 4761.10(A).

Because R.C. 4761.03 vests in the Ohio Respiratory Care Board the duty to regulate the practice of respiratory care under R.C. Chapter 4761, it is within the authority of the Ohio Respiratory Care Board to determine the manner in which it will regulate such practice, including the determination of what aspects of respiratory care constitute limited aspects of respiratory care for purposes of R.C. 4761.10(A). *See id.* S*ee, e.g.*, *Industrial Comm'n v. Brown*, 92 Ohio St. 309, 311, 110 N.E. 744, 745 (1915) ("[a]dministrative interpretation of a given law, while not conclusive, is, if long continued, to be reckoned with most seriously and is not to be disregarded and set aside unless judicial construction makes it imperative so to do"). Moreover, no statute of which we are aware has conferred upon any entity other than the Ohio Respiratory Care Board the authority to define the term "limited aspects of respiratory care," as that phrase is used in R.C. 4761.10(A). Any interpretation of this term by the Ohio Respiratory Care Board is, of course, subject to judicial review for abuse of discretion. S*ee Hocking Valley Railway Co. v. Public Utilities Comm'n*, 92 Ohio St. 362, 110 N.E. 952 (1915) (a

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[12] To the extent that this question concerns the Board's duty to use the rule-making procedures of R.C. Chapter 119 in identifying additional "limited aspects of respiratory care services" for purposes of R.C. 4761.10(A), we note that, "[t]he decision of an administrative agency whether to use its rule-making authority or its adjudication authority to resolve a dispute lies primarily in the informed discretion of the agency." *Hamilton County Bd. Of Mental Retardation and Developmental Disabilities v. Professionals Guild*, 46 Ohio St. 3d 147, 545 N.E.2d 1260 (1989) (syllabus, paragraph two). The circumstances in which administrative agencies like the Ohio Respiratory Care Board must make determinations through the rule-making process of R.C. Chapter 119 were summarized, as follows, in the syllabus of 1995 Op. Att'y Gen. No. 95-009: if an administrative board, in making a determination as to the scope of practice of the profession it regulates, "establishes a standard, rule, or regulation that is to have general and uniform operation, such determination must be adopted as a rule in accordance with the requirements of R.C. Chapter 119." *See generally* R.C. 4761.03(A) (requiring the Ohio Respiratory Care Board to adopt rules in accordance with R.C. Chapter 119).

court will not substitute its judgment for that of an administrative body, but determinations made by such a body are subject to judicial review for abuse of discretion).[13]

We must also note, however, that, although the Ohio Respiratory Care Board is responsible for determining what tasks constitute "limited aspects of respiratory care services" for purposes of R.C. 4761.10(A), the Board of Nursing retains the authority to regulate the practices of nursing, including the delegation of nursing tasks, *see* R.C. 4723.06(A)(1). Even though R.C. 4761.03 requires the Ohio Respiratory Care Board to regulate the practice of respiratory care, R.C. 4761.11(A)(1) makes the restrictions and prohibitions of R.C. Chapter 4761 inapplicable to "the practice, services, and activities" of, among others, licensed registered nurses. Thus, if a licensed registered nurse delegates a nursing task to an unlicensed person in accordance with 11 Ohio Admin. Code Chapter 4723-13, such delegation is within the practice of nursing as a registered nurse, and, pursuant to R.C. 4761.11(A)(1), is not subject to the prohibitions and restrictions of R.C. Chapter 4761, even if such task is also a respiratory care task outside of those determined to be "limited aspects of respiratory care services" for purposes of R.C. 4761.10(A).

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1. R.C. 4761.11(A)(1) excepts from the restrictions and prohibitions of R.C. Chapter 4761, including the prohibition contained in R.C. 4761.10(A), the practice, services, or activities of a licensed registered nurse, including the delegation of nursing tasks in accordance with 11 Ohio Admin. Code Chapter 4723-13, whether or not in a hospital setting, even if such tasks also fall within the practice of respiratory care, as defined in R.C. 4761.01(A).

2. It is within the discretion of the Ohio Respiratory Care Board to determine, within the limitations prescribed by R.C. 4761.10(A), what other tasks, similar to measuring blood pressure and taking blood samples, constitute limited aspects of respiratory care for purposes of that statute.

3. If a licensed registered nurse delegates a nursing task to an unlicensed person in accordance with 11 Ohio Admin. Code Chapter 4723-13, such delegation is within the practice of nursing as a registered nurse, and, pursuant to R.C. 4761.11(A)(1), is not subject to the prohibitions and restrictions of R.C. Chapter 4761, even if such task is also a respiratory care task outside of those

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[13] The Attorney General is without authority to exercise on behalf of another officer or entity of the government discretion that has been bestowed by statute on that officer or entity. *See generally* 1985 Op. Att'y Gen. No. 85-007; 1984 Op. Att'y Gen. No. 84-098.

determined to be "limited aspects of respiratory care services" for purposes of R.C. 4761.10(A).

Respectfully,

BETTY D. MONTGOMERY
Attorney General

February 25, 2000

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SYLLABUS: 2000-016

1. R.C. 4761.11(A)(1) excepts from the restrictions and prohibitions of R.C. Chapter 4761, including the prohibition contained in R.C. 4761.10(A), the practice, services, or activities of a licensed registered nurse, including the delegation of nursing tasks in accordance with 11 Ohio Admin. Code Chapter 4723-13, whether or not in a hospital setting, even if such tasks also fall within the practice of respiratory care, as defined in R.C. 4761.01(A).

2. It is within the discretion of the Ohio Respiratory Care Board to determine, within the limitations prescribed by R.C. 4761.10(A), what other tasks, similar to measuring blood pressure and taking blood samples, constitute limited aspects of respiratory care for purposes of that statute.

3. If a licensed registered nurse delegates a nursing task to an unlicensed person in accordance with 11 Ohio Admin. Code Chapter 4723-13, such delegation is within the practice of nursing as a registered nurse, and, pursuant to R.C. 4761.11(A)(1), is not subject to the prohibitions and restrictions of R.C. Chapter 4761, even if such task is also a respiratory care task outside of those determined to be "limited aspects of respiratory care services" for purposes of R.C. 4761.10(A).