

OPINION NO. 2009-002

Syllabus:

2009-002

Under its authority to adopt rules “necessary for its government and for the administration and enforcement of [R.C. Chapter 4741],” R.C. 4741.03(C)(9), the Ohio Veterinary Medical Licensing Board possesses authority to adopt rules that establish duties animal aides may perform, so long as the Board complies with the requirements for such rules set forth in R.C. 4741.01(G).

To: Theresa Stir, Executive Director, Ohio Veterinary Medical Licensing Board, Columbus, Ohio

By: Nancy H. Rogers, Attorney General, January 5, 2009

You have requested an opinion of the Attorney General concerning 11B Ohio Admin. Code (2008-2009 Supp.) 4741-1-14, a portion of which authorizes an animal aide, under the direct supervision of a licensed veterinarian, to perform venipuncture for purposes of collecting blood samples. As you have explained, the question has arisen concerning the authority of the Ohio Veterinary Medical Licensing Board (“OVMLB” or “the Board”) to adopt a rule that authorizes an animal aide to perform this particular activity.

To answer your question, we begin by noting that the Ohio Veterinary Medical Licensing Board is a creature of statute, R.C. 4741.02, with those powers and duties vested in it by the General Assembly. *Shell v. Ohio Veterinary Med. Licensing Bd.*, 105 Ohio St. 3d 420, 2005-Ohio-2423, 827 N.E.2d 766 at ¶32 (“[t]he board has only those powers explicitly delegated by statute and must operate within whatever limitations are contained within its enabling statutes”).

Among the Board’s statutory duties are the enforcement of R.C. Chapter 4741, R.C. 4741.03(C)(6), and the adoption, in accordance with R.C. Chapter 119, of rules “necessary for its government and for the administration and enforcement of [R.C. Chapter 4741],” R.C. 4741.03(C)(9). Your question concerns the Board’s enforcement of R.C. 4741.19(A), which prohibits anyone, unless exempted by R.C. Chapter 4741, from practicing veterinary medicine¹ without a proper license, permit,

¹ For purposes of R.C. 4741.19, R.C. 4741.01(B) defines the “practice of veterinary medicine” as meaning:

[T]he practice of any person who performs any of the following actions:

- (1) Diagnoses, prevents, or treats any disease, illness, pain, deformity, defect, injury, or other physical, mental, or dental condition of any animal;
- (2) Administers to or performs any medical or surgical technique on any animal that has any disease, illness, pain, deformity, defect, injury, or other physical, mental, or dental condition or performs a surgical procedure on any animal;
- (3) Prescribes, applies, or dispenses any drug, medicine, biologic, anesthetic, or other therapeutic or diagnostic substance, or applies any apparatus for any disease, illness, pain, deformity, defect, injury, or other physical, mental, or dental condition of any animal;
- (4) Uses complementary, alternative, and integrative therapies on animals;
- (5) Renders professional advice or recommendation by any means, including telephonic or other electronic communication with regard to any activity described in divisions (B)(1) to (4) of this section;
- (6) Represents the person’s self, directly or indirectly, publicly or privately, as having the ability and willingness to perform an act described in divisions (B)(1) to (4) of this section;

or certificate issued by the OVMLB. R.C. 4741.19(A).² See generally R.C. 4741.20 (exceptions to application of R.C. Chapter 4741).³

(7) Uses any words, letters, abbreviations, or titles in such connection and under such circumstances as to induce the belief that the person using them is engaged in the practice of veterinary medicine.

² R.C. 4741.19(A) states:

Unless exempted under this chapter, no person shall practice veterinary medicine, or any of its branches, without a license or limited license issued by the state veterinary medical licensing board pursuant to sections 4741.11 to 4741.13 of the Revised Code, a temporary permit issued pursuant to section 4741.14 of the Revised Code, or a registration certificate issued pursuant to division (C) of this section, or with an inactive, expired, suspended, terminated, or revoked license, temporary permit, or registration.

³ R.C. 4741.20 provides the following exceptions:

This chapter does not apply to:

(A) A person who administers to animals, the title to which is vested in the person's self, except when the title is so vested for the purpose of circumventing the provisions of this chapter. No person shall vest title of an animal in the person's self for the purposes of circumventing this chapter.

(B) A person who is a regular student in a legally chartered college of veterinary medicine or a veterinary technology college while in the performance of those duties and actions assigned by the person's instructors;

(C) A person who is a member of the armed forces of the United States or an employee of the United States department of agriculture, the United States public health service, or other federal agency, or the Ohio department of agriculture except a licensed veterinarian, and who, while so commissioned or employed, performs official duties;

(D) A person who advises with respect to or performs acts which the state veterinary medical licensing board by rule has prescribed as accepted management practices in connection with livestock production;

(E) A person who conducts routine vaccinations, pullorum testing, and typhoid testing of poultry and other poultry disease control activity under supervision of a national poultry improvement plan as administered by an official state agency or the United States department of agriculture;

(F) A physician licensed to practice medicine in this state, or the assistant of such a licensed physician, while engaged in medical research;

(G) A person who is supervised by a licensed veterinarian and who is engaged in bona fide medical biomedical research which requires the application of the principles of a veterinary practice;

R.C. 4741.19 contains additional prohibitions, *e.g.*, prohibiting veterinary students from engaging in certain activities, prohibiting a veterinarian who has not met certain requirements from claiming to be a specialist, prohibiting anyone from acting as a registered veterinary technician without first being registered as such with the OVMLB. At the same time, R.C. 4741.19 lists specific activities in which a registered veterinary technician may engage, as well as the circumstances in which allied medical support⁴ may assist a veterinarian. R.C. 4741.19 thus specifies the activities in which various categories of persons may and may not engage in the examination and treatment of animals.

Not mentioned in R.C. 4741.19, however, are those individuals who act as “animal aides,” defined in R.C. 4741.01(G), as follows:

a person who is employed by a licensed veterinarian and supervised by a licensed veterinarian or a registered veterinary technician to perform duties such as record keeping, animal restraint, and such *other duties that the board, by rule, establishes*. In adopting the rules, the board shall include rules regarding the degree of supervision required for each duty. The rules shall be consistent with generally accepted standards of veterinary medical practice. (Emphasis added.)

Thus, an animal aide, when employed and supervised as required therein, may perform various duties, including record keeping, animal restraint, and “such other duties that the board, by rule, establishes.” R.C. 4741.01(G). In establishing such duties through the statutorily prescribed rule-making procedure, the Board is required by R.C. 4741.01(G) to meet two conditions—(1) The degree of supervision required in the performance of each such duty must be prescribed by rule; and (2) The rule must be consistent with generally accepted veterinary medical practice standards. Accordingly, under its authority to adopt rules “necessary for its government and for the administration and enforcement of [R.C. Chapter 4741],” R.C. 4741.03(C)(9), the Board possesses authority to adopt rules that establish duties animal aides may perform, so long as the Board complies with the requirements for such rules set forth in R.C. 4741.01(G).

(H) A veterinary consultant when consulting with a licensed veterinarian, on the condition that the service performed by the veterinary consultant is limited to the consultation and under all circumstances, the responsibility for the care and treatment of the patient remains with the veterinarian who holds a current license in this state and who is providing treatment, or consultation as to treatment, to the patient;

(I) A person who offers gratuitous services in the case of an emergency.

⁴ As used in R.C. 4741.19, “allied medical support” means “a licensed dentist, physician, chiropractor, or physical therapist who is in good standing as determined under Chapter 4715., 4731., 4734., or 4755. of the Revised Code, as applicable.” R.C. 4741.01(L).

The Board has adopted rule 4741-1-14, which states, in pertinent part: “(B) *After appropriate training* consistent with generally accepted standards of veterinary medical practice, an animal aide may perform venipuncture for the purpose of collecting blood samples under the *direct supervision of a licensed veterinarian.*” (Emphasis added.) Rule 4741-1-14(B) includes a statement of the degree of supervision required to perform venipuncture and, as stated in your letter, the Board has determined that the substance of rule 4741-1-14(B) is consistent with generally accepted standards of veterinary practice. Thus, rule 4741-1-14(B) meets the two requirements established by R.C. 4741.01(G) for the Board’s identification by rule of the duties, in addition to record keeping and animal restraint, that an animal aide may perform.

Whether the performance of venipuncture by animal aides is or is not consistent with generally accepted standards of veterinary practice is a question of fact that cannot be resolved by means of an opinion of the Attorney General. *See, e.g.*, 1993 Op. Att’y Gen. No. 93-033 (syllabus, paragraph 1) (concluding, in part, that questions of fact “cannot be determined by means of an Attorney General opinion”); 1987 Op. Att’y Gen. No. 87-082 (syllabus, paragraph 3) (stating, in part, “R.C. 109.14 does not authorize the Attorney General to decide questions of fact by means of an opinion”). Rather, as acknowledged in *Sterling Drug, Inc. v. Wickham*, 63 Ohio St. 2d 16, 22, 406 N.E.2d 1363 (1980), “agency expertise is a relevant factor in agency rule-making. Particularly so, where . . . the evidence is medically complex and technical in nature,” and thus courts tend to defer to factual determinations made by administrative agencies. Similarly, the question whether the performance of venipuncture falls within R.C. 4741.01(B)(1) or (2), as part of the “practice of veterinary medicine,” *see* note one, *supra*, is a question of fact that cannot be determined by means of an opinion of the Attorney General.

Based upon the foregoing, it is my opinion, and you are hereby advised that, under its authority to adopt rules “necessary for its government and for the administration and enforcement of [R.C. Chapter 4741],” R.C. 4741.03(C)(9), the Ohio Veterinary Medical Licensing Board possesses authority to adopt rules that establish duties animal aides may perform, so long as the Board complies with the requirements for such rules set forth in R.C. 4741.01(G).