

OPINION NO. 71-049

Syllabus:

1. The Board of Nursing Education and Nurse Registration may not limit the number of times that an applicant otherwise qualified may take an examination for registration or licensing.

2. Examination, endorsement, and waiver fees of applicants are not retainable by the Board of Nursing Education and Nurse Registration, but must be paid into the State Treasury immediately upon receipt. After such fees have been paid into the State Treasury, they cannot be returned to the applicants.

3. The Board of Nursing Education and Nurse Registration has the right to delay issuance of an interim permit while investigating or verifying any of the conditions listed in Section 4723.40, Revised Code.

4. The Board of Nursing Education and Nurse Registration has no power to delay issuance of a renewal license while in-

investigating or verifying matters listed in Section 4723.28, Revised Code.

5. The Auditor of State, through the Chief Inspector and Supervisor of Public Offices, may, in his discretion, prescribe methods necessary for thorough audit for replacing lost certificates or licenses.

To: Dorothy B. Leupp, Exec. Secretary, Board of Nursing Education and Nurse
Registration, Columbus, Ohio

By: William J. Brown, Attorney General, September 9, 1971

I have before me your request for my opinion on the following questions:

"1. Can the Board limit the number of times an applicant may repeat the examination?

"2. May the Board retain examination, endorsement and waiver fees of applicants who have not completed their applications for licensure after a specified period of time?

"3. May the Board retain examination and waiver fees of applicants whose applications are complete, but have repeatedly failed to report for the examination?

"4. Does the Board have the right to delay issuance of an interim permit or to delay renewal of a license while investigating or verifying any of the conditions listed in Section 4723.28, R.C.?

"5. Is the 'duplicate' certificate being issued by the Board a valid legal document?"

Regarding your first question, Section 4723.05, Revised Code, provides, in part, as follows:

"The board of nursing education and nurse registration may make * * * such rules as are necessary to carry out the provisions of Sections 4723.01 to 4723.40, inclusive, of the Revised Code."

The Sections of the Revised Code which state the conditions that must be met to take the examination are Sections 4723.09 and 4723.18, Revised Code. Section 4723.09, supra, applies to professional nursing, and provides, in part, as follows:

"* * *The applicant shall file with the executive secretary of the board a written ap-

plication, under oath, on a form prescribed and furnished by the board, and submit proof that the applicant is of good moral character. The applicant shall also file documentary evidence that before matriculating in a school of nursing such applicant was a graduate of an accredited high school or its equivalent and that such applicant is a graduate of an approved school of professional nursing as defined by the board."

Section 4723.18, supra, applies to practical nursing and has similar requirements to be met in order to take the examination.

For the Board to make a rule pursuant to Section 4723.05, supra, limiting the number of times an applicant may repeat the examination, such rule must carry out the provisions of Sections 4723.09 and 4723.18, supra, which are the only sections setting conditions for taking the examination. Regulatory boards can interpret or construe the statutes, but cannot create additional law by adding to or expanding the statutes. A rule of a regulatory board is valid if it is adopted pursuant to a statute and interprets existing statutes. Strain v. Southerton, 148 Ohio St. 153 (1947); Akron and Barberton Belt Rd. Co. v. Public Utilities Commission, 148 Ohio St. 282 (1947); State ex rel. Curtis v. DeCorps, 134 Ohio St. 295 (1938); Coady v. Leonard, 132 Ohio St. 329 (1937). However, where a rule of a regulatory board adds to, expands, extends, or improves the provisions of the statute to meet a situation not provided for, it is not valid. Ransom and Randolph Co. v. Evatt; 142 Ohio St. 298 (1944); State ex rel. Foster v. Evatt, 144 Ohio St. 65 (1944); State ex rel. Homan v. Board of Embalmers and Funeral Directors of Ohio, 135 Ohio St. 321 (1939). See, also, Wetterer v. Board of Health, 167 Ohio St. 127, 137 (1957).

In this case, if the Board were to adopt a rule limiting the number of times an applicant may repeat the examination, it would be adding a condition because the statute is silent on that subject while setting out other requirements specifically. A rule interpreting the statute, for example, as to what constitutes good moral character, would be valid. The rule in question here, however, would be an addition to, rather than an interpretation of, the statute, and therefore would not be valid.

Questions two and three both concern the Board's retention of fees of applicants who have either failed to complete their applications or failed to report for the examination. Upon receipt of such fees, the Board is not authorized to retain them, but is required to deposit them in the State Treasury to the credit of the General Revenue Fund. Section 4723.21, Revised Code. Thus, upon deposit, the fees are no longer within the Board's control and practically could not be returned. One of my predecessors has so ruled in Syllabus No. 2 of Opinion No. 1703, Opinions of the Attorney General for 1928, which reads as follows:

"Where an applicant for a license to practice nursing in Ohio is required to take the examination provided for in Sections 1295-5 et seq., General Code, and transmits the required fee for such examination with her diploma, such fee should immediately be paid into the state treasury by the treasurer of the state medical board and should not be returned to the applicant in the event no license or certificate is issued."

I hereby approve and follow that Opinion.

Thus, it is my opinion that examination, endorsement, and waiver fees of applicants are not retainable by the Board, but must be paid into the State Treasury immediately upon receipt. After such fees have been paid into the State Treasury, they cannot be returned to the applicants.

Your fourth question concerns the right of the Board to delay issuance of an interim permit or to delay renewal of a license while investigating or verifying any of the conditions listed in Section 4723.28, Revised Code. That Section provides, in pertinent part, as follows:

"Before the board may revoke, deny, or suspend such certificate or license, or otherwise discipline the holder of a certificate or license, written charges shall be filed with the board by the executive secretary and a hearing shall be had thereon as provided in sections 119.01 to 119.13, inclusive, of the Revised Code."

An interim permit is a nonrenewable permit to practice professional or practical nursing for a period not exceeding six months, which may be issued by the State Board of Nursing Education and Nurse Registration under the circumstances stated in Section 4723.40, Revised Code. A delay in the issuance of such an interim permit, while verifying the information required for issuance, would not constitute a revocation, denial, or suspension under Section 4723.28, supra, and could thus be accomplished without a hearing.

A delay in the renewal of a license, however, stands on a different footing. Renewal licenses are provided for in Section 4723.24, Revised Code, which is, in pertinent part, as follows:

"* * *On or before the first day of each December, the board of nursing education and nurse registration shall mail an application for renewal of the certificate to every registered nurse to whom such certificate has been issued or renewed during the current year. The applicant shall fill in the renewal blank

and return it to the board with a renewal fee in an amount not to exceed two dollars before the first day of January of each year. Upon receipt of the renewal application and fee, the board shall verify the accuracy of the application and issue to the applicant a certificate for renewal for the year effective on the first day of March of that year and expiring on the last day of February of the following year.* * *"

Subsequent almost identical language in the Section governs renewal for licensed practical nurses.

It is apparent that renewal is a right of the licensee and the procedure therefor is a nearly automatic one, all consistent with the recognition that the licensee's livelihood may be impaired substantially if license is not issued. It follows that delay pending investigation could impair the licensee's right to earn and would, in fact, constitute a suspension of license without prior hearing as required in Section 4723.28, supra.

Thus, it is my opinion that the Board has the right to delay issuance of an interim permit while investigating or verifying any of the conditions listed in Section 4723.40, supra, but does not have the right to delay renewal of a license while investigating or verifying conditions listed in Section 4723.28, supra.

I construe your final question to ask whether the Board can properly issue duplicate certificates. It is my understanding that this question arises because the Auditor of State has questioned the procedure being followed for the reason that audit of certificates issued is not possible where original and duplicate certificates are issued in the same form. The power of the Auditor is set out in Section 117.05, Revised Code, which reads, in part, as follows:

"The chief inspector and supervisor of public offices shall prescribe and require the installation of a system of accounting and reporting for the public offices named in Section 117.01 of the Revised Code. Such system shall be uniform in its application to offices of the same grade and accounts of the same class, and shall prescribe the form of receipt, vouchers, and documents required to separate and verify each transaction, and forms of reports and statements required for the administration of such offices or for the information of the public."

Section 117.05, supra, applies to the Board, and the Chief Inspector and Supervisor of Public Offices, under the Auditor

of State, is authorized to prescribe the form of documents and reports used by the Board.

The object of the Auditor of State when making an audit of a public institution, such as the Board, is to determine that proper charges have been made and funds accounted for. The issuance of duplicate certificates, under a procedure in which all certificates are not identifiable as originals or duplicates, can make a thorough audit impossible. Since the Auditor is authorized to order correction in this type of situation, it is not within my province to deal with the problem you present.

As to your final question, it is my opinion that the Auditor of State, through the Chief Inspector and Supervisor of Public Offices, may, in his discretion, prescribe requirements for audit of records of the Board, including requirement for replacing licenses.

In specific answer to your questions, it is my opinion, and you are so advised that:

1. The Board of Nursing Education and Nurse Registration may not limit the number of times that an applicant otherwise qualified may take an examination for registration or licensing.
2. Examination, endorsement, and waiver fees of applicants are not retainable by the Board, but must be paid into the State Treasury immediately upon receipt. After such fees have been paid into the State Treasury, they cannot be returned to the applicants.
3. The Board of Nursing Education and Nurse Registration has the right to delay issuance of an interim permit while investigating or verifying any of the conditions listed in Section 4723.40, Revised Code.
4. The Board of Nursing Education and Nurse Registration has no power to delay issuance of a renewal license while investigating or verifying matters listed in Section 4723.28, Revised Code.
5. The Auditor of State, through the Chief Inspector and Supervisor of Public Offices, may, in his discretion, prescribe methods necessary for thorough audit for replacing lost certificates or licenses.