

OPINION NO. 71-001

Syllabus:

The duty sought to be imposed upon the Board of Nursing Education and Nurse Registration by the Secretary of Health, Education, and Welfare by the regulation, codified as 20 C.F.R. Section 405.-1124 (d) (2), is a duty which, under present state law, the Board is without power to fulfill.

To: Dorothy B. Leupp, Exec. Sec'y., Board of Nursing Education and Nurse Registration, Columbus, Ohio
By: Paul W. Brown, Attorney General, January 5, 1971

I have before me your request for my opinion which reads as follows:

Does the Board of Nursing Education and Nurse Registration have the legal power under Ohio law, with particular reference to Sections 4723.04, 4723.16 and 4723.17, Revised Code, to make an evaluation of an individual's educational achievement or to determine that an individual possesses education and training which the Board considers to be the equivalent of graduation from a state-approved school of practical nursing, so as to fulfill the duty sought to be imposed upon it by the Secretary of Health, Education, and Welfare by the regulation codified as 20 C.F.R. Section 405.-1124 (d) (2) ?

Section 4723.04, Revised Code, prescribes the powers of the Board. It provides in pertinent part as follows:

"The board shall examine applicants for a certificate to practice professional nursing as a registered nurse in this state, and shall examine applicants for a license to practice practical nursing as a licensed practical nurse in this state. Each applicant shall be examined in such subjects relating to nursing as the board may require. The board may issue and renew certificates of registration and licenses, define the minimum curricula and standards for educational programs of the schools of professional nursing and schools of practical nursing in this state, and survey and in-

spect such schools and approve such schools as meet the requirements as prescribed by the board; and deny or withdraw approval from schools for failure to meet prescribed curricula or other standards, after a hearing as provided in sections 119.01 to 119.13, inclusive, of the Revised Code. The board shall keep a record of all of its proceedings and make an annual report to the governor."

Section 4723.16, Revised Code, and Sections 4723.18 and 4723.19, Revised Code, specifically outline the steps which must be taken by an applicant, and the information which may be required by the Board, in the licensing of practical nurses. Section 4723.16, supra, is applicable to individuals applying for licensure by waiver of formal education requirements, while Sections 4723.18 and 4723.19, supra, are applicable to individuals applying for licensure following graduation from a school of practical nursing approved by the Board. These statutes read as follows:

Section 4723.16.

"After April 1, 1971, no person shall practice practical nursing in this state as a licensed practical nurse or practical nurse, as defined in section 4723.15 of the Revised Code without first complying with the requirements of sections 4723.01 to 4723.40, inclusive, of the Revised Code. A resident of Ohio who is practicing practical nursing in this state without being licensed as a licensed practical nurse, shall file with the board of nursing education and nurse registration on or before December 31, 1970, a written application, verified by the applicant's oath and supported by the certificate of two licensed physicians of this state or by two registered nurses of this state or by one such licensed physician and one such registered nurse on a form prescribed by the board setting forth the fact that applicant has worked with each of such persons and has been practicing nursing as a practical nurse for more than two years next preceding the date of such application and that the applicant is competent and is of good moral character and shall pay to the board a fee in an amount not to exceed the sum of fifteen dollars. The board shall then admit such person to examination.

"The board shall issue to the applicant complying with this section and passing the examination a license to practice practical nursing and authorize him to use the initials 'L.P.N.' in connection with his identity, effective upon the receipt of such license by the applicant."

Section 4723.18.

"Any person desiring to practice practical nursing and who is not specifically provided for in section 4723.16 or 4723.17 of the Revised Code, shall apply to the board of nursing education and nurse registration for a license and submit to the examination provided by sections 4723.01 to 4723.40, inclusive, of the Revised Code. The applicant shall file with the executive secretary of the board a written application, under oath, on a form prescribed and furnished by the board and submit proof that the applicant is more than eighteen

years of age and of good moral character, who graduated from an approved school of practical nursing in good standing, as defined by the board."

Section 4723.19.

"If the board of nursing education and nurse registration finds that the applicant possesses the credentials necessary for admission to examination, that the elementary school education meets the requirements of the board, that the applicant is a graduate of an approved school of practical nursing in good standing, as defined by the board, and that the person named in the diploma or other evidence of graduation, is the person holding or presenting it, and is of good moral character, the board shall admit the applicant to an examination."

It should be noted that Section 4723.16, supra, prescribes the filing of an affidavit by an applicant, but makes no provisions for inquiry by the Board into the applicant's education and training, while Section 4723.19, supra, specifically does. Further, Section 4723.17, Revised Code, which became effective at the same time as the foregoing statutes, provides as follows:

"Any person holding a license to practice practical nursing as a licensed practical nurse issued by the board of nursing education and nurse registration under sections 4723.01 to 4723.40, inclusive, of the Revised Code, have the same rights and privileges and be subject to the same duties and qualifications as other persons receiving licenses as licensed practical nurses from the board of nursing education and nurse registration under sections 4723.01 to 4723.50, inclusive, of the Revised Code."

The question which must first be considered arises from the apparent conflict between the Ohio law prescribing its powers, and requiring equal treatment of all licensed practical nurses, with part of a rule or regulation promulgated by the Secretary of Health, Education, and Welfare, codified as 20 C.F.R. Section 405.1124 and headed "Condition of participation - nursing services", which is one of the rules or regulations promulgated by him to implement Title XIX of the Social Security Act, 42 U.S.C. Section 1395, et seq., popularly known as "Medicaid".

20 C.F.R. Section 405.1124 (d), headed "Standard; charge nurse", is pivotal to the present request and is hereafter referred to as "the HEW regulation".

42 U.S.C. Section 1396 (a) (28) (b), which is part of the Social Security Act and is the stated statutory basis of the HEW regulation, requires that a state plan for participation in the Medicaid program must provide that any skilled nursing home receiving payments under such plan must "have and maintain an organized nursing service for its patients, which is under the direction of a professional registered nurse who is employed full time by such nursing home, and which is composed of sufficient nursing and auxiliary personnel to provide adequate and properly supervised nursing services for such patients during all hours of each day and all days of each week * * *."

20 C.F.R. Section 405.1124 (d) establishes a standard for

charge nurses in extended care facilities, which by statutory definition include skilled nursing homes. This standard must be met as a condition of participation in the Medicaid program, and requires, in pertinent part, that:

"[t]here is at least one registered professional nurse or qualified licensed practical nurse who is a graduate of a State-approved school of practical nursing on duty at all times and in charge of the nursing activities during each tour of duty. The factors explaining the standard are as follows:

"(1) A State-approved school of practical nursing is one whose standards of education meet those set by the appropriate State nurse licensing authority.

"(2) Some State laws grant practical nurse licensure (non-waivered) to certain individuals who have an educational background considered to be equivalent to graduation from a State-approved school of practical nursing. Such licensure determination is made by the appropriate State nurse licensing authority on the basis of evaluation of the individual's educational achievements, as well as on successful completion of the appropriate State licensing examination. Licensure under such conditions may be accepted as meeting the requirements of graduation from a State-approved school of practical nursing."

(Emphasis added.)

An interpretation of the above standard has been made by the Commissioner of the Social and Rehabilitation Service of the Department of Health, Education, and Welfare, and has been brought to my attention in his correspondence with your office dated July 30, 1970, a copy of which you attached to your letter of request. This correspondence indicates that HEW has held that the above standard is satisfied if there is on duty and responsible for the nursing services an individual who is "1. a registered professional nurse or 2. a practical nurse who (a) holds a State license as a practical nurse, and (b) has had training that includes (1) graduation from a State-approved school of practical nursing; or (2) other education and training that is considered by the State agency responsible for the licensing of practical nurses to be the equivalent of graduation from a State-approved school of practical nursing* * *." (Emphasis added.)

The question raised by the Board with regard to the recently promulgated regulation by HEW, 20 C.F.R. Section 405.1124, does not relate to those applicants for licensure who are graduates of state-approved schools of practical nursing. As to them, the Board is not required by the HEW regulation to make an "evaluation of the individual's education achievements" or to determine that the individual possesses "education and training that is considered by the [Board] to be the equivalent of graduation from a State-approved school of practical nursing."

But, as to individuals who were licensed by waiver of formal educational requirements, the HEW regulation seeks to impose a duty upon state boards to make determinations of the educational qualifications of individuals occupying charge nurse positions as a prerequisite to the granting of federal assistance to extended care facilities employing such individuals.

An important distinction in the application of the federal regulation must be recognized in order to characterize the duty which HEW seeks to impose upon the State Board. The federal regulation does not constitute a congressional assumption of state power by entering wholly or partially into the field of examination and licensing of practical nurses; rather, the federal regulation merely imposes a condition which must be fulfilled if extended care facilities are to receive federal assistance. Therefore, federal law in no way supersedes state law in the area of nurse licensing and examination, and the powers reserved to the state under the Tenth Amendment to the United States Constitution are respected and preserved.

Part ten of the syllabus in the case of Carter v. Carter Coal Co., 56 S. Ct. 855, 298 U.S. 238 (1936), provides as follows:

"While states are not sovereign in true sense of term but only quasi-sovereign, yet in respect of all powers reserved to them they are supreme and independent of federal government as that government within its sphere is independent of the states."

In support of the concept of state sovereignty and in regard to federal statutes granting the state bridge commission the right to charge tolls to recoup costs of construction, the Supreme Court of New Jersey in Driscoll v. Burlington-Bristol Bridge Co., 86 A. 2d 201, at 229 (1952), cert. denied 73 S. Ct. 25, 344 U.S. 838, 97 L. Ed. 652, stated that the federal government cannot grant power to an agency of the state which the state legislature has not seen fit to grant. This principle applies equally to the present problem.

Therefore, the remaining question for consideration is whether the General Assembly has granted to the Board of Nursing Education and Nurse Registration the authority to make the determination necessary to comply with the standards set forth in the HEW regulation.

While Section 4723.04, Revised Code, prescribes the powers of the Board, it contains no express provision for compliance with the HEW regulation. Neither does any other Revised Code section. In the absence of any specific legislative authority, the Board of Nursing Education and Nurse Registration is without power to fulfill the duty or function sought to be imposed upon it by the Secretary of Health, Education, and Welfare by the regulation codified as 20 C.F.R. Section 405.1124 (d) (2).

Therefore, it is my opinion and you are hereby advised that the duty sought to be imposed upon the Board of Nursing Education and Nurse Registration by the Secretary of Health, Education, and Welfare by the regulation, codified as 20 C.F.R. Section 405.1124 (d) (2), is a duty which, under present state law, the Board is without power to fulfill.