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NO. STATE OF NEBRASKA
OFFICIAL
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DEPT. OF JUSTICE

DATE: March 12, 1993

SUBJECT: Authority of the State Board of Health to define active practice under Neb. Rev. Stat. § 71-114(1) (1990) for purposes of appointing members to boards of examiners.

REQUESTED BY: Mark B. Horton, M.D., M.S.P.H.
Director, Nebraska Department of Health

WRITTEN BY: Don Stenberg, Attorney General
Jan E. Rempe, Assistant Attorney General

The State Board of Health ("Board") is required by statute to appoint a board of examiners for each of the health-related professions governed by Nebraska's Uniform Licensing Law. Neb. Rev. Stat. § 71-111 (1990). Neb. Rev. Stat. § 71-114(1) (1990) requires that every professional member of the various boards of examiners be "actively engaged in the practice of his or her profession in the State of Nebraska, under a license or certificate issued in this state, for a period of five years just preceding his or her appointment." You have requested our opinion on three questions regarding the Board's authority to define "actively engaged in the practice of his or her profession," as used in section 71-114(1). We will address each of your questions individually.

1. <u>Can the State Board of Health develop a definition of "active practice" to use in determining whether an individual is qualified to be appointed as a professional member of a Board of Examiners</u>?

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As a board of state government authorized by law to make rules and regulations, the State Board of Health appears to be an "agency" under the Nebraska Administrative Procedure Act ("APA"), Neb. Rev. Stat. §§ 84-901 to 84-920 (1987 & Cum. Supp. 1992). Neb. Rev. Stat. § 84-901(1) (1987) (definition of "agency" for purposes of the APA); Neb. Rev. Stat. § 71-2610.01 (Cum. Supp. 1992) (State Board of Health has power and duty to adopt and promulgate rules and regulations necessary to implement laws enforced by the Department of Health through the Bureau of Examining Boards).

Administrative boards and agencies may express their interpretation of laws they are charged with administering through rule-making procedures. "The primary function of a regulation is to interpret an ambiguous statute and clarify its meaning." *Northern Natural Gas Co. v. O'Malley*, 277 F.2d 128, 134 (8th Cir. 1960). *See also Trebesch v. Employment Div.*, 300 Or. 264, 710 P.2d 136 (1985); *Department of Professional Regulation v. Florida Soc'y of Professional Land Surveyors*, 475 So. 2d 939 (Fla. Dist. Ct. App. 1985). However, an agency may not modify, alter, enlarge, or contradict the statutory provisions the agency is charged with administering. *State ex rel. Spire v. Stodola*, 228 Neb. 107, 421 N.W.2d 436 (1988); *Cornhusker Christian Children's Home, Inc. v. Department of Social Servs.*, 227 Neb. 94, 416 N.W.2d 551 (1987), *appeal dismissed*, 109 S. Ct. 298 (1988).

Therefore, the State Board of Health generally has the authority to interpret section 71-114(1), which it is charged with administering, as long as the Board does not change the meaning of or contradict that statute.

2. <u>If the Board has authority to develop such a definition can it be done through a written policy or is a regulation required</u>?

Some federal and state statutes exempt agency rules which solely interpret statutes from rule-making requirements like public notice and hearing. Arthur E. Bonfield, State Administrative Rule Making § 6.9.2(a) (1986). However, under Nebraska's APA, most rules, regulations, or standards (1) designed to interpret law enforced by an agency, (2) not concerning the internal management of the agency, and (3) not affecting private rights, private interests, or procedures available to the public must follow the rule-making requirements outlined in the APA.

In this case, the State Board of Health proposes to interpret part of the law enforced by it. The Board seeks to clarify one of the qualifications required for appointment to a board of

examiners; that is, being actively engaged in the practice of the relevant profession for a specified period of time. Further, since Neb. Rev. Stat. § 71-117 (Cum. Supp. 1992) invites persons possessing the "necessary qualifications" to apply to the State Board of Health for appointment to a board of examiners, defining the statutory active practice qualification would not result in a rule, regulation, or standard governing "internal management" of the Board. The resulting rule, regulation, or standard would affect private rights, private interests, and application procedures available to interested members of the public under section 71-117. By defining the active practice requirement in section 71-114(1), the Board would be informing the public regarding the Board's view of the law, dictating who would be qualified for appointment to a board of examiners, and compelling persons who wish to apply for appointment under section 71-117 to conform to certain practice standards.

Therefore, any definition of "actively engaged in the practice of his or her profession," as used in section 71-114(1), must be developed in conformance with the rule-making procedures set forth in Nebraska's APA in order to be legally effective.

Of course, the Board must have statutory authority to adopt such regulations, including a proper legislative delegation of power to create regulations to implement statutory policy. Neb. Rev. Stat. § 84-905.01 (1987) (Attorney General to review regulations for statutory authority); ***Stodola***, 228 Neb. 107, 421 N.W.2d 436; ***Cornhusker***, 227 Neb. 94, 416 N.W.2d 551. Since it appears that section 71-2610.01(1)(a) is the only statute delegating to the State Board of Health the power to make the type of regulation at issue, any regulation developed by the Board must be "necessary to implement laws enforced by the department [of health] through the bureau [of examining boards]." § 71-2610.01(1)(a). If the statutes addressing the Board's duty to appoint boards of examiners, such as sections 71-111 and 71-114, are "enforced" by the Department of Health "through" the Bureau of Examining Boards, it would appear that the State Board of Health would have the proper statutory authority to adopt a regulation interpreting the active practice aspect of section 71-114(1).

3. <u>Can the Board define "actively engaged in the practice of his or her profession" as "Any individual maintaining an active license or certificate in his or her profession, as determined by the Nebraska Department of Health, and meeting all requirements for relicensure or recertification, as determined by the respective Board of Examiners, and whose primary occupation requires licensure or certification in his or her profession"</u>?

In construing administrative regulations, principles of statutory construction apply. ***Iowa Federation of Labor v. Iowa Dep't of Job Serv.***, 427 N.W.2d 443 (Iowa 1988); ***Detroit Base Coalition v. Department of Social Servs.***, 431 Mich. 172, 428 N.W.2d 335 (1988); ***Nelson v. South Dakota State Bd. of Dentistry***, 464 N.W.2d 621 (S.D. 1991). Statutory words and phrases should be construed according to the common and approved usage of the language; however, phrases which have acquired a peculiar and appropriate legal meaning should be construed according to such meaning. Neb. Rev. Stat. § 49-802(5) (1988).

The "active practice" of law has been construed to mean the pursuit of legal activities on a full-time basis which constitutes one's regular business. ***Undem v. State Bd. of Law Examiners***, 266 Ark. 683, 587 S.W.2d 563 (1979) (case involved application for admission to state bar by reciprocity). Another court has interpreted engaging in the "active practice" of law as devotion of a substantial portion of one's time and energy to the rendering of legal services, which are extensive in scope, in one's employed capacity. ***Application of Payne***, 430 P.2d 566 (Alaska 1967) (application for admission to state bar by reciprocity).

Therefore, it would appear that "actively engaged in the practice of his or her profession," as used in section 71-114(1), has acquired a legal meaning by which that phrase must be construed. While the above cases, involving reciprocal professional licensure, are arguably factually distinguishable from appointment of professionals to boards of examiners, the interests in allowing qualified, experienced professionals to practice in a state by reciprocity and the interests in appointing qualified, experienced professionals to examine professional licensure applicants for competency are similar. Further, we were unable to locate any legislative history which reveals the intent or meaning of the active practice language in section 71-114(1). In the absence of such history, we believe this active practice language must be construed similarly to the legal meaning given to like phrases in ***Undem*** and ***Payne***.

The Board's proposed definition of active practice is not consistent with this legal meaning. Simply maintaining an "active license or certificate" by paying required fees and completing continuing education requirements when one needs a license or certificate to practice a profession, Neb. Rev. Stat. § 71-110 (1990), is very different from the devotion of a substantial portion of one's time and energy to rendering professional services. In other words, the right or privilege to practice is

different from being actively engaged in the practice of a profession.

Since the Board's regulation defining active practice will be scrutinized according to the rules of statutory construction discussed above, the definition suggested in your letter is not adequate because it conflicts with the proper legal interpretation of the active practice language contained in section 71-114(1).

CONCLUSION

The State Board of Health can, by regulation, define the active practice language contained in section 71-114(1), but such a definition should conform to the correct legal meaning of this language, as determined by applying appropriate rules of statutory construction.

Sincerely,

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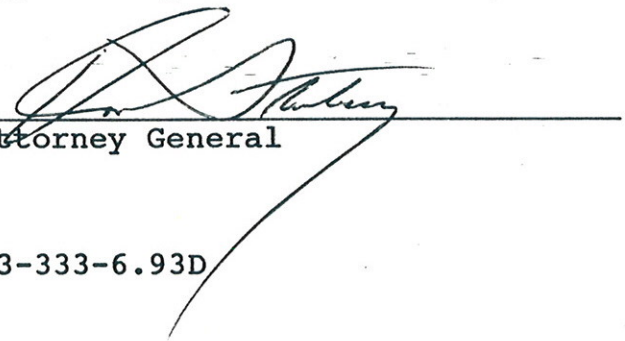
Approved By:



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