Linda Willard

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STATE OF NEBRASKA
OFFICIAL
OCT 4 1990
DEPT. OF JUSTICE

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Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: October 2, 1990

SUBJECT: The Department of Health's Authority and Obligation Pursuant to Neb.Rev.Stat. § 39-669.14 (Reissue 1988)

REQUESTED BY: Gregg F. Wright, M.D., M.ED.
Director, Department of Health

WRITTEN BY: Robert M. Spire, Attorney General
Melanie J. Whittamore-Mantzios, Assistant Attorney General

You have asked the following questions concerning Neb.Rev.Stat. § 39-669.14 (Reissue 1988):

1. Whether or not qualified technician means emergency medical technician-paramedics?

2. Whether or not Neb.Rev.Stat. § 39-669.14 gives the Department of Health the authority to develop rules and regulations defining qualified technicians and regulating qualified technicians, and if so, what is the scope of the subject matter of that regulatory authority?

3. Does Neb.Rev.Stat. § 39-669.14 recognize that unlicensed persons may draw blood if they are "qualified technicians" not only for purposes of testing for alcohol content but for any purpose? If so, what authority, if any, would the Department have to regulate those persons?

We have concluded that qualified technician may include emergency medical technician-paramedics. The Department of Health has no authority to develop regulations defining and regulating a class of unlicensed or uncertified individuals to withdraw blood as qualified technicians pursuant to Neb.Rev.Stat. § 39-669.14. Precisely what qualified technician means in Neb.Rev.Stat. § 39-669.14 is unclear. However, it is our conclusion that

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Neb.Rev.Stat. § 39-669.14 does not recognize that unlicensed individuals may withdraw blood.

A certified emergency medical technician-paramedic or trainee may be construed as being a qualified technician for purposes of Neb.Rev.Stat. § 39-669.14. A certified emergency medical technician-paramedic or trainee may withdraw blood upon the order of a physician or approved physician's surrogate if the following conditions are met:

1. The emergency medical technician-paramedic is employed by or serving as a volunteer member of an approved service program.

2. Voice contact or a telemetered electrocardiogram is monitored by an approved licensed physician or by an approved physician's surrogate when authorized and supervised by an approved license physician, and the physician surrogate is authorized to withdraw blood.

3. Direct communication is maintained between the emergency medical technician-paramedic and the approved licensed physician or approved physician's surrogate.

4. The blood is withdrawn at the scene of an emergency; during transportation to the hospital; during transfer of a patient between hospitals; or while in the hospital emergency department and under the supervision of a licensed physician.

Neb.Rev.Stat. §§ 71-5508(4) and 71-5520(3)(g) (1989 Supp.). Note, that if certified emergency medical technician-paramedics or trainees are construed as qualified technicians, they are restricted to withdrawing blood only in the situations mentioned above.

The Department of Health does not have the authority to develop rules and regulations defining and regulating a new class of unlicensed or uncertified individuals to withdraw blood as qualified technicians. The legislative history behind the term qualified technician in Neb.Rev.Stat. § 39-669.14 indicates the term "qualified technician" was used to replace the obsolete term of "registered lab technician." Legislative debate, February 28, 1974, p. 58-62. Senator Barnett introduced LB 669 to the Committee on Agriculture and Environment and made the following statement:

> The amendment that we have got in here that is proposed is in accordance with the Uniform Vehicle Code to

> recognize the qualified technicians, wording is the problem, the way they call these laboratory technicians and registered technicians and all this stuff. So, what we have to do is come in with a qualified technician to draw these blood samples and to register these things in the State of Nebraska. All of these people would be subject to the standards imposed by the Department of Health. So that, in effect, means that you just can't pull somebody off the street and have them draw blood, anybody, they will have to pass the test or pass the standards that are set by the Department of Health.

Minutes of the hearing on Committee on Agriculture and Environment, February 8, 1974, p. 1. The Legislature has not given the Department of Health the authority to promulgate rules and regulations governing qualified technicians.

The Legislature may provide for the licensure and regulation of professions in which the public interest is great through the exercise of its police power. Fowler v. Board of Registration in Chiropody, 374 Mich. 325, 132 N.W.2d 82 (1965). The Legislature, however, may not delegate its legislative power to an administrative agency. State v. Cutright, 193 Neb. 303, 226 N.W.2d 771 (1975); Gillette Dairy, Inc. v. Nebraska Dairy Products Board, 192 Neb. 89, 219 N.W.2d 214 (1974); and School District No. 39 of Washington County v. Decker, 159 Neb. 693, 68 N.W.2d 354 (1955). "It is fundamental that in the legislative grant of power to an administrative agency such power must be limited to the express legislative purpose and administered in accordance with standards described in the legislative act." T.V. Transmission, Inc. to Neb. Ass'n of Pub. Employees v. Game and Parks, 220 Neb. 883, 885, 374 N.W.2d 46, 48 (1985). See also, Gillette Dairy, Inc. v. Nebraska Dairy Products Board, supra.

The Department of Health has the authority to promulgate regulations concerning the tests and methodologies utilized for analyzing alcohol content in breath, urine, and blood. Neb.Rev.Stat. § 39-669.11 (Reissue 1988). The Department also has the authority to ascertain the competence and qualifications of persons who may perform such tests on the alcohol content in blood, breath, and urine and issue permits to such qualified people. Neb.Rev.Stat. § 39-669.11. However, Neb.Rev.Stat. § 39-669.11 only gives the Department authority to regulate the methodology of testing blood. Neb.Rev.Stat. § 39-669.11 does not specifically delegate authority to the Department of Health to determine who may withdraw blood, nor could the Legislature do so.

Even though the legislative history of Neb.Rev.Stat. § 39-669.14 indicates that the Legislature anticipated that the Department of Health would develop rules and regulations concerning

qualified technicians, the Legislature failed to enact any law authorizing the Department of Health to do so.

Physicians, registered nurses, and qualified technicians may withdraw blood for the purpose of determining alcohol content at the direction of a law enforcement officer pursuant to Neb.Rev.Stat. § 39-669.14. The Legislature has identified physicians as being persons licensed to practice medicine and surgery or persons otherwise excepted from being licensed. Neb.Rev.Stat. §§ 71-1,102 and 71-1,103 (Reissue 1986). Registered nurses have also been identified by the Legislature as being those persons licensed to practice as a registered nurse. Neb.Rev.Stat. § 71-1,132.18 (Reissue 1986). The Legislature has failed to statutorily identify qualified technicians.

It is our opinion that Neb.Rev.Stat. § 39-669.14 does not authorize unlicensed persons to withdraw blood. The practice of medicine and surgery is defined broadly in Neb.Rev.Stat. § 71-1,102. Included within the definition of medicine and surgery is the following:

> Persons who publicly profess to be physicians, surgeons or obstetricians, or publicly profess to assume the duties incident to the practice of medicine and surgery or obstetrics, or any of their branches; . . .

Neb.Rev.Stat. § 71-1,102(1). This definition would include the drawing of blood. There are certain classes of persons who are not to be construed as engaging in the unauthorized practice of medicine and surgery. Neb.Rev.Stat. § 71-1,103. There is no exception for qualified technicians per se in Neb.Rev.Stat. § 71-1,103, but there is an exception for persons who are licensed or certified under the laws of this state to practice a limited field of the healing art. Neb.Rev.Stat. § 71-1,103(14). Since the Legislature in enacting a statute is presumed to have knowledge of all previous legislation upon the subject, it is reasonable to interpret Neb.Rev.Stat. § 39-669.14 as recognizing that only persons who are already licensed or certified to withdraw blood may do so. Wahlers v. Frye, 205 Neb. 399, 401, 288 N.W.2d 29, 30 (1980).

The interpretation that qualified technician means persons who are already certified or licensed to withdraw blood is further supported by the statutory construction doctrine of ejusdem generis. Under the doctrine of ejusdem generis, qualified technician would be the general term that is defined by the specific terms of physicians and registered nurses. Since physicians and registered nurses are licensed by the State, this would mean that qualified technicians must also be licensed or certified by the State to withdraw blood.

There are other licensed and certified professionals who may also be able to withdraw blood, besides physicians and registered nurses. Licensed practical nurses may be authorized to withdraw blood if it is within their educational background and under the direction of a physician or registered nurse pursuant to Neb.Rev.Stat. § 71-1,132.06(5) (Reissue 1986). A physician's assistant may be able to withdraw blood with the appropriate supervision of the sponsoring physician pursuant to Neb.Rev.Stat. §§ 71-1,107.17 and 71-1,107.29 (Reissue 1986). An emergency medical technician-paramedic may draw blood under certain circumstances as already mentioned. See Neb.Rev.Stat. §§ 71-5520(3)(g) (1989 Supp.).

If qualified technician is interpreted to mean persons who are otherwise authorized by law to draw blood, then the Department of Health would have the same authority that they have already been delegated by the Legislature to regulate these professions, i.e., licensed practical nurses, physician's assistants, and emergency medical technician-paramedics. The Department of Health does not have the authority to regulate a new class of unlicensed or uncertified individuals to withdraw blood.

Sincerely,

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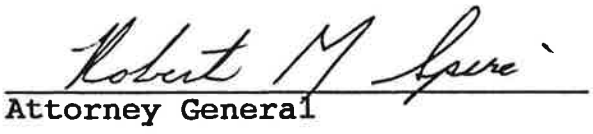
Assistant Attorney General

36-01-14.2

APPROVED:



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