DEPARTMENT OF JUSTICE
STATE OF NEBRASKA
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NO.
STATE OF NEBRASKA
OFFICIAL
MAR 3 1988
DEPT OF JUSTICE

ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: March 1, 1988

SUBJECT: Authority of legislature to delegate legislative functions to private persons

REQUESTED BY: Senator Richard Peterson
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
Marilyn B. Hutchinson, Assistant Attorney General

You have asked two questions about a proposed amendment to Neb.Rev.Stat. §71-1,107.17 (Reissue 1986), a statute pertaining to physician assistants. The amendment would permit a physician assistant, other than one with a temporary certificate, to practice without the personal presence of any supervising physician at a site away from the primary practice site of such physician if such physician determines the physician assistant is competent to do so and such physician establishes the standards of supervision which will assure that the physician assistant is rendering quality care there.

1. Is this an unconstitutional delegation of legislative authority? We have concluded that it probably is, as discussed below.

The legislature may not delegate to private persons a legislative function. Rowe v. Ray, 120 Neb. 118, 231 N.W. 689 (1930). In that case the claim was made that the legislature had conferred a legislative function upon private individuals, contrary to the provisions of Section 1, Article II and Section 1, Article III of the Nebraska Constitution.

The court agreed. "The legislature may prescribe and fix the terms and conditions on which a law may come into operation." Then it may leave to some officer or official body the determining whether the prescribed terms and conditions exist. Supra at 122. But it may not delegate such functions to private individuals. Id. at 123.

L. Jay Bartel, Martel J. Bundy, Janie C. Castaneda, Elaine A. Catlin, Dale A. Comer, Laura L. Freppel, Lynne R. Fritz, Yvonne E. Gates, Royce N. Harper, William L. Howland, Marilyn B. Hutchinson, Mel Kammerlohr, Charles E. Lowe, Lisa D. Martin-Price, Steven J. Moeller, Harold I. Mosher, Fredrick F. Neid, Bernard L. Packett, Marie C. Pawol, Jill Gradwohl Schroeder, LeRoy W. Sievers, James H. Spears, Mark D. Starr, John R. Thompson, Susan M. Ugai, Linda L. Willard

In the present case the legislative functions being delegated to private individuals are the authority to determine whether a physician assistant is competent to practice without the personal presence of a supervising physician and the authority to determine what supervision is required to assure that such physician assistant is rendering quality care. (These are necessarily the questions of minimum competency and minimum supervision. The supervising physician can always require more from the physician assistant for whom he or she has agreed to be liable.)

The legislature has made the required supervision of a physician assistant the critical distinction between the practice of medicine by a certified physician assistant and by a licensed physician and surgeon. Neb.Rev.Stat. §71-1,107.29. The legislature has set the boundaries of practice by a physician assistant: (1) Delegation of health care tasks must be consistent with the patient's health and welfare. Neb.Rev.Stat. §71-1,107.15(2). (2) Supervision must be sufficient to provide quality medical care. Neb.Rev.Stat. §71-1,107.16(5). If the legislature now delegates to private individuals the determination of when those conditions are met, it will be re-enacting the case presented in Rowe v. Ray.

2. Would this provision restrict the Department of Health from promulgating rules and regulations on the supervision of physician assistants? We have concluded it would, as discussed below.

Under present law, the Board of Examiners in Medicine and Surgery, with the approval of the Department of Health, is authorized to adopt rules and regulations which will "assure that every physician assistant performs his or her services under the responsible supervision and control of a physician or group of physicians." Neb.Rev.Stat. §71-1,107.24. That board, with the concurrence of the department, certifies applicants who meet the statutory requirements. Neb.Rev.Stat. §§71-1,107.16(4) and 71-1,107.19(1). That board, with the concurrence of the department, approves physicians to supervise such certified physician assistants. Neb.Rev.Stat. §71-1,107.20(2).

Specific legislation relating to a particular subject takes precedence over general legislation on that subject when there is a conflict between them. See, Duerfeldt v. State Game and Parks Comn, 184 Neb. 242, 166 N.W.2d 737 (1969) and Hall v. Cox Cable, 212 Neb. 887, 327 N.W.2d 595 (1982). Thus, to the extent that the proposed amendment would authorize the supervising physician to determine questions of competency and supervision, there is an

infringement of the exercise of those functions by the board with the approval or concurrence of the department.

Sincerely yours,

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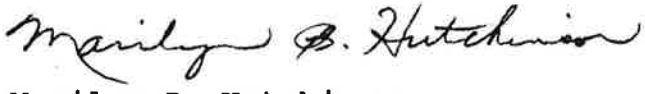
Attorney General



Marilyn B. Hutchinson
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cc: Patrick J. O'Donnell
Clerk of the Legislature

APPROVED BY:

Attorney General