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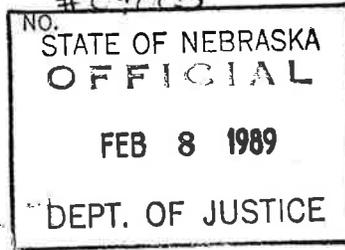
DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

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STATE CAPITOL

LINCOLN, NEBRASKA 68509



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DATE: February 6, 1989

SUBJECT: Scope of Practice of Nurses Employed in Veterans' Hospitals in Nebraska

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

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

You have asked whether the state or federal government controls the scope of practice for nurses employed in veterans' hospitals in Nebraska. We have concluded both do, as discussed below.

1. Both licensing and exemption from licensing limit the scope of practice of nurses in Nebraska.

The practice of nursing both for registered and practical nurses is defined in Neb.Rev.Stat. §71-1,132.05 (Reissue 1986). Any person licensed as a nurse is not deemed to be practicing medicine and surgery when confining themselves strictly to the limited field of the healing art for which they are licensed. Neb.Rev.Stat. §71-1,103(14) (Reissue 1986).

Persons exempted from licensing are not authorized to practice medicine and surgery. Neb.Rev.Stat. §71-1,132.06 (Reissue 1986).

Thus scope of practice is what a licensee is authorized to do by such license. It is what a person exempt from such licensure is authorized to do without such license. In that way licensure sets the bounds of permissible practice by all nurses within the territorial jurisdiction of the State of Nebraska.

2. The state cannot compel a nurse employed in a veterans' hospital in Nebraska to be licensed by the State of Nebraska.

The United States Constitution provides in Art. VI, cl. 2 that it and the laws of the United States made in pursuance thereof

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shall be the supreme law of the land, anything in the laws of any state to the contrary notwithstanding.

In Johnson v. State of Maryland, 254 U.S. 51 (1920), an employee of the post office department, while driving a government motor truck in the transportation of mail over a post road in Maryland, was arrested, tried, convicted and fined for so driving without having obtained a license from the state. The Court found:

Of course, an employee of the United States does not secure a general immunity from state law while acting in the course of his employment.

Supra at 56. However, the Court went on to conclude:

It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer, upon examination, that they are competent for a necessary part of them, and pay a fee for permission to go on. Such a requirement does not merely touch the government servants remotely by a general rule conduct; it lays hold of them in their specific attempt to obey orders, and requires qualifications in addition to those that the government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work, and that duty it must be presumed has been performed.

(Emphasis added.) Id. at 57.

State law can be preempted in either of two general ways: (1) If Congress has evidenced an intent to occupy a given field and (2) If a state law stands as an obstacle to the accomplishment of the full purposes of Congress. The first can apply even if Congress has not entirely displaced state regulation over the matter in question if the state law conflicts with federal law. That is, when it is impossible to comply both with state and federal law. See, California Coastal Commission v. Granite Rock Co., 480 U.S. _____, 94 L.Ed. 2d 577 (1987).

Thus the State of Nebraska cannot compel a nurse employed in a veterans' hospital in this state to be licensed in this state unless Congress has manifested an intent that such nurses shall be so licensed and such licensing does not interfere with the accomplishment of the full purposes of Congress.

3. The state has not attempted to compel a nurse employed in a veterans' hospital in Nebraska to be licensed in this state.

Neb.Rev.Stat. §71-1,132.04 and 71-1,132.06 require a person to be licensed in this state to practice nursing as defined by Neb.Rev.Stat. §71-1, 132.05 unless he or she is licensed as a nurse in another state and employed by the United States government or any bureau, division or agency thereof while in the discharge of his or her official duties or comes within other listed exceptions.

Thus Neb. has not tried to enforce its licensure requirements on persons employed by the United States government in veterans' hospitals in this state if such persons are licensed as nurses in another state.

4. Congress has authorized granting a state concurrent territorial jurisdiction over the veterans' hospitals within such state.

In 1975 the Administrator of Veteran's Affairs gave back to the State of Nebraska so much of the jurisdiction it had relinquished in 1883 as was necessary to give the state concurrent jurisdiction over veterans' hospitals in Omaha, Lincoln, and Grand Island. See, 38 USC §5012, Neb.Rev.Stat. §§72-602 (Reissue 1958) and 80-413 (Reissue 1987) and letter from Administrator of Veteran's Affairs to Governor Exon on September 12, 1975, accepted by such governor on October 8, 1975.

Thus the State of Nebraska now has concurrent territorial jurisdiction over the veterans' hospitals in Omaha, Lincoln, and Grand Island.

5. Congress has required a graduate nurse employed in a veterans' hospital to be registered in a state and has authorized the Administrator of Veterans' Affairs to set qualifications for practical and vocational nurses employed in such hospitals.

38 USC §4105(3) requires that a nurse employed in a veterans' hospital shall be "registered as a graduate nurse in a State." Subsection (9) authorizes the Administrator of Veterans' Affairs to prescribe the medical and technical qualifications and experience for licensed practical and vocational nurses. He has done so in personnel regulation DM and S Supp., MP-5, Part II, c. 2, Appendix 2P, section A.3. "Full active and current licensure as a graduate licensed practical or vocational nurse" is required in a state, territory or commonwealth of the United States or in the District of Columbia.

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Thus the federal government has made licensure a qualification for employment as a nurse in a veterans' hospital but such licensure does not have to be by the state where the nurse is employed.

6. Making licensure a condition of employment manifests an intent by the federal government that such nurses shall be subject to regulation as licensees of the state that licenses them.

United States v. Composite State Board of Medical Examiners of the State of Georgia, No. C/9-1943A, (D.C.N.D.Ga, Atlanta Division, 1983), paralleled Lewis v. Composite State Board of Medical Examiners, Civil Action No. C-51995, in the Superior Court of Fulton County, State of Georgia, in which the federal government was not permitted to intervene. The federal government challenged action by the board to discipline Dr. Norris S. Lewis, one of its licensees, who was employed by the federal government to practice in Georgia. As part of that practice he supervised a physician assistant who was licensed in New York and also employed by the federal government. In doing so he let the physician assistant write prescriptions without his co-signature.

Dr. Lewis was first charged with aiding and abetting the practice of medicine by an unlicensed person. Both the state court and the federal court held the board could not do that since federal law, which was supreme, required only that a physician assistant be licensed by a state. However, both the state court and the federal court held the board could discipline the physician for permitting his physician assistant to write prescriptions without his co-signature in violation of Georgia law. By violating such state requirement he was also violating the federal law that required him to be licensed.

That decision makes clear that only the regulation of licensees which is inconsistent with federal law is prohibited. Regulations which support the accomplishment of congressional purposes can be enforced by a state because violation of them also violates federal law.

Conclusion

Scope of practice is the essence of licensure to practice nursing. It is the maximum practice permitted by a person having stated qualifications as evidenced by a license. The state licenses nurses to engage in such acts and no others. Thus it would be inconsistent with the federal requirement for licensure by a state if the Administrator of Veterans' Affairs and not the state of licensure set the scope of practice for nurses licensed by such state but employed in veterans' hospitals.

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We have concluded that the State of Nebraska may take action against the licenses of nurses licensed in this state who exceed their scope of practice while employed as nurses in a veteran's hospital in this state.

Respectfully submitted,

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16-60-13