

December 20, 2007

The Honorable Gilda Cobb-Hunter
Member, South Carolina House of Representatives
112 Estate Court
Orangeburg, South Carolina 29115

The Honorable Vincent A. Sheheen
Member, South Carolina Senate
P.O. Drawer 10
Camden, South Carolina 29021

Dear Representative Cobb-Hunter and Senator Sheheen:

We received your letter requesting an opinion as to the interpretation of proviso 50.9 passed by the General Assembly during the last legislative session. You state in your letter that the General Assembly enacted this provision “as an attempt to extend a grandfather provision in Pharmacy Practice Act, Section 40-43-82(B)(1), in order to provide registered technicians with one final opportunity to become certified without having to meet the criteria imposed by legislation effective June 1, 2004?” You informed us that on two previous occasions the Pharmacy Board voted to extend the “grandfathering” deadline contained in section 40-43-82(B)(1) to allow pharmacy technicians to take the National Examination required for certification. In one instance, the Pharmacy Board extended the deadline for certification until September 2004 for the July 2004 examination. Subsequently, the Pharmacy Board extended the deadline to December 31, 2004 for the November 2004 examination. You stated in your letter as follows:

Somehow during the drafting of Senator Sheheen’s proviso, a scrivener’s or other error occurred. The date of November 2004, which is not found in the Pharmacy Practice Act, but which represented the last opportunity the Board chose to allow registered pharmacy technicians to take the examination, appeared in the proviso rather than a date that satisfied the intent of the General Assembly to extend the grandfather provision. Thus far, the Pharmacy Board has refused to issue certifications to technicians under the Proviso, purportedly because of the November 4, date cited in the Proviso.

Accordingly, you ask “whether the Pharmacy Board can be compelled to issue pharmacy technician certification to applicants that meet the intent of the Proviso?”

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Law/Analysis

As you mentioned in your letter, section 40-43-82 of the South Carolina Code (Supp. 2006) governs the registration and certification of pharmacy technicians. Particularly, subsection (B) of this provision states the requirements that an individual must satisfy to become a certified pharmacy technician by the Pharmacy Board. Subsection (B)(1) provides:

(B)(1) An individual may be certified by the board as a pharmacy technician if the individual has:

(a) worked for fifteen hundred hours under the supervision of a licensed pharmacist as a registered pharmacy technician or has completed a Board of Pharmacy approved pharmacy technician course as provided for in subsection (D); however, beginning July 1, 2004, to be certified as a pharmacy technician an individual must have worked for one thousand hours under the supervision of a licensed pharmacist as a technician and must have completed a Board of Pharmacy approved technician course as provided for in subsection (D);

(b) a high school diploma or equivalent; and

(c) passed the National Pharmacy Technician Certification Board exam or a Board of Pharmacy approved exam and has maintained current certification; and

(d) fulfilled continuing education requirements as provided for in Section 40-43-130(G).

(2) The pharmacist-in-charge shall verify compliance with the requirements of item (a) of subsection (B)(1) and maintained a record of this requirement in a readily retrievable manner for inspection.

According to this statute, prior to July 1, 2004, an individual could work fifteen hundred hours under a licensed pharmacist or complete a pharmacy technician course to become certified. However, beginning on this date, the individual must complete both a work experience requirement and an approved pharmacy technician's course to become certified.

As you indicated, proviso 50.9 of the 2007-2008 appropriations act appears to amend section 40-43-82(B)(1). 2007 S.C. acts 117. This proviso states:

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Of the funds appropriated to the Department of Labor, Licensing and Regulation for Professional & Occupational Licensing, a one-time certification process must be implemented for the certification of Pharmacy Technicians who have met the academic and supervised practice requirements as of November of 2004, but not all of the required information was submitted in accordance with the Board's submission requirements. These individuals must have met all the requirements of Section 40-43-82 (A), (B), (C).

Id.

In reading the proviso, we must keep in mind the general rules of statutory interpretation. As our Supreme Court recently stated in State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007):

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citations omitted). All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used. McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002). A statute's language must be construed in light of the intended purpose of the statute. Id. Whenever possible, legislative intent should be found in the plain language of the statute itself. Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997). “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” Hodges, 341 S.C. at 85, 533 S.E.2d at 581.

The plain language used in the proviso indicates applicants for certification must meet the academic and supervised practice requirement prior to November 2004. According to your letter, the inclusion of the November 2004 date was a result of a scrivener’s error or some other error. You state the intention of the Legislature was to use some other date in order to extend the grandfather provision. Nonetheless, the Pharmacy Board, in reading the proviso, takes the position that it cannot issue certifications to technicians who did not satisfy the requirements prior to November 2004.

We do not second guess your assessment of the Legislature’s intent with regard to the passage of the proviso, because you as members of the Legislature certainly are acutely aware of your intent in enacting legislation. However, this Office lacks the ability to rewrite a piece of legislation that appears clear on its face. Our courts take the position that “[w]here there is no ambiguity, words must not be added to or taken from the statute.” Home Building & Loan Ass’n v. City of Spartanburg, 185 S.C. 313, 194 S.E. 139, 142 (1937). In this instance, we do not find the proviso ambiguous on its face and therefore, do not believe this Office or a court may replace the November 2004 date with another date. Furthermore, as we stated on occasion, “this Office cannot rewrite a statute or add or take away phrases

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from a statute. That may only be done by the General Assembly.” Op. S.C. Atty. Gen., August 11, 1998 (citations omitted). Accordingly, we advise that the Legislature correct the error within the proviso through legislative action in order to clarify the time frame through which the grandfather provision extends.

Conclusion

Based upon a plain reading of proviso 50.9, we are of the opinion that the plain language of this provision allows the Pharmacy Board to certify applicants meeting the academic and supervised work experience requirements prior to November of 2004. We understand from your letter, that the Legislature did not intent to use the November 2004 date when it enacted the proviso. Rather, the Legislature intended to use another date. Nonetheless, we do not believe this Office has the authority to rewrite the statute, which is unambiguous on its face, to reflect the Legislature’s intent. Accordingly, we suggest the Legislature take legislative action to correct the error.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General