



HENRY McMASTER
ATTORNEY GENERAL

August 30, 2010

The Honorable David L. Thomas
South Carolina Senate, District No. 8
Suite 410, Gressette Building
PO Box 142
Columbia, SC 29202

Dear Senator Thomas:

We received your letter requesting an opinion of this Office concerning South Carolina Nursing Board's authority to require current nurses licensed in South Carolina to submit to a state and federal finger-print based criminal background check.

As a way of background you explained that South Carolina's "Department of Labor, Licensing and Regulation recently sent out a letter to 6,000 nurses who are currently licensed to practice nursing in South Carolina. The letter advised nurses that they were 'randomly' selected and that according to South Carolina Code Section 40-33-25 they must complete a 'state and federal criminal records check (CBC), supported by fingerprints.'" You also mentioned that the nurses were "responsible for the \$54.25 for the state and federal, finger-print based, criminal records checks."

This opinion will address prior opinions of this office, relevant statutes and caselaw to determine the authority of the South Carolina Board of Nursing in this instance.

Law/Analysis

The South Carolina Code explains that regulatory boards, such as the South Carolina Board of Nursing, have certain powers and duties. Specifically, S.C. Code § 40-1-70 states as follows:

The powers and duties of regulatory boards include, but are not limited to:

- (1) determining the eligibility of applicants for examination and licensure;
- (2) examining applicants for licensure including, but not limited to:
 - (a) prescribing the subjects, character, and manner of licensing examinations;

- (b) preparing, administering, and grading the examination or assisting in the selection of a contractor for the preparation, administration, or grading of the examination;
- (3) establishing criteria for issuing, renewing, and reactivating the authorizations to practice of qualified applicants, including the issuance of active or permanent, temporary, limited, and inactive licenses, or other categories as may be created;
- (4) adopting a code of professional ethics appropriate to the profession or occupation which it licenses or regulates;
- (5) evaluating and approving continuing education course hours and programs;
- (6) conducting hearings on alleged violations of this article and regulations promulgated under this article;
- (7) resolving consumer complaints, where appropriate and possible;
- (8) disciplining persons licensed under this article in a manner provided for in this article;
- (9) promulgating regulations which have been submitted to the director, at least thirty days in advance of filing with Legislative Council as required by Section 1-23-30.

S.C. Code § 40-1-70.

Additional power and duties of the Board of Nursing are provided for in S.C. Code § 40-33-10(I):

- (I) In addition to the powers and duties enumerated in Section 40-1-70, the board may:
 - (1) publish advisory opinions and position statements relating to nursing practice procedures or policies authorized or acquiesced to by any agency, facility, institution, or other organization that employs persons authorized to practice under this chapter to comply with acceptable standards of nursing practice;
 - (2) **develop minimum standards for continued competency of licensees continuing in or returning to practice;**
 - (3) conduct surveys of educational enrollments and licensure and report to the public;
 - (4) conduct investigations and hearings concerning alleged violations of this chapter;
 - (5) develop minimum standards for nursing education programs;
 - (6) approve nursing education programs that meet the prescribed standards;
 - (7) deny or withdraw approval or limit new student admissions of nursing education programs that fail to meet the prescribed standards;
 - (8) **use minimum standards as a basis for evaluating safe and effective nursing practice;**

- (9) examine, license, and renew the authorizations to practice of qualified applicants;
- (10) join organizations that develop and regulate the national nursing licensure examinations and promote the improvement of the practice of nursing for the protection of the public;
- (11) **collect any information the board considers necessary, including social security numbers or alien identification numbers, in order to report disciplinary actions to national databanks of disciplinary information;**
- (12) establish guidelines to assist employers of nurses when errors in nursing practice can be handled through corrective action in the employment setting;
- (13) establish a fee schedule in regulations.

S.C. Code § 40-33-10(I) (Supp. 2009) (emphasis added).

In an opinion of this Office dated February 15, 1978, we were asked whether the State Board of Nursing had the authority to promulgate regulations regarding the delegation and supervision of nursing practice. In relevant part, we stated as follows:

In general, administrative bodies have the authority to make or adopt rules and regulations with respect to matters which are within the province of the body. The provisions of the statute control as to what areas rules and regulations may deal with. The rules and regulations can properly function to effectuate the purpose of the legislation. See, 91 C.J.S. Public Administrative Bodies and Procedures, § 112.

In dealing with the power of the Public Service Commission to approve a transference of a trucking certificate, the South Carolina Supreme Court stated that **a governmental body of limited power is not in a strait jacket in the administration of the laws under which it operates because it also possesses powers which may be inferred or implied in order to effectively exercise the expressed powers** possessed by it. Beard Laney, Inc. v. Darby, 213 S.C. 380, 49 S.E.2d 564 (1948).

The validity of specific rules and regulations must of course depend on the actual content of the rules and regulations but the authority of an administrative body to enact rules and regulations within the scope of the law governing the administrative agency is clearly established. Cole v. Manning, 240 S.C. 260, 125 S.E.2d 621 (1962); Terry v. Pratt, 258 S.C. 177, 187 S.E.2d 884 (1972). Faile v. S.C. Employment Sec. Comm., 230 S.E.2d 219 (1976).

Op. S.C. Atty. Gen., February 15, 1978 (emphasis added). Similar to the power explained in the 1978 opinion above, the Board has power to “develop minimum standards for continued competency of licensees,” “use minimum standards as a basis for evaluating safe and effective nursing practice,” and “collect any information the board considers necessary . . . to report disciplinary actions to national databanks of disciplinary information.” S.C. Code § 40-33-10(I)(2), (8), and (11). To carry

out the express duties in S.C. Code § 40-33-10(I)(2), (8), and (11), it is a logical conclusion that the Board implicitly has the authority to require licensed nurses to participate in a finger-print based criminal records check.

The request letter suggests that S.C. Code § 40-33-25 “does not require current licensees to undergo criminal background checks, only new applicants.” S.C. Code § 40-33-25 states as follows:

- (A) In addition to other requirements established by law and **for the purpose of determining an applicant's eligibility for licensure to practice nursing, the department may require a state criminal records check, supported by fingerprints, by the South Carolina Law Enforcement Division, and a national criminal records check, supported by fingerprints, by the Federal Bureau of Investigation.** The results of these criminal records checks must be reported to the department. The South Carolina Law Enforcement Division is authorized to retain the fingerprints for certification purposes and for notification of the department regarding criminal charges. **Costs of conducting a criminal history background check must be borne by the applicant.** The department shall keep information received pursuant to this section confidential, except that information relied upon in denying licensure may be disclosed as may be necessary to support the administrative action.
- (B) **In an investigation or disciplinary proceeding concerning a licensee, the department may require a state criminal records check, supported by fingerprints, by the South Carolina Law Enforcement Division, and a national criminal records check, supported by fingerprints, by the Federal Bureau of Investigation.** The results of these criminal records checks must be reported to the department. The South Carolina Law Enforcement Division is authorized to retain the fingerprints for certification purposes and for notification of the department regarding criminal charges. **Costs of conducting a criminal history background check must be borne by the department** and may be recovered as administrative costs associated with an investigation or hearing pursuant to this chapter unless ordered by the board as a cost in a disciplinary proceeding. The department shall keep information received pursuant to this section confidential, except that information relied upon in an administrative action may be disclosed as may be necessary to support the administrative action.
- (C) Notwithstanding any other provision of this section or any other provision of law, the dismissal of a prosecution of a fraudulent intent in drawing a dishonored check case by reason of want of prosecution or proof of payment of restitution and administrative costs must not be used as evidence of an act of moral turpitude for disciplinary purposes or for the purposes of disqualifying a person seeking licensure or renewal of licensure pursuant to this chapter.

“If a statute’s language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning. The words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limit or expand the statute’s operation.” Strickland v. Strickland, 375 S.C. 76, 88-89, 650 S.E.2d 465, 472 (2007).

The request letter is correct in part, as the statute explains that nurse applicants¹ or licensed nurses going through an investigation or disciplinary proceeding² may be required to participate in a finger-print based criminal records check. However, nothing in the statute suggests that licensed nurses who are not involved in an investigation or disciplinary proceeding are protected or prohibited from participation in a finger-print based criminal records check. Requiring licensees to participate in the finger-print based criminal records check is an inferred power³ or logical extension of the express powers given to the Board of Nursing.⁴ Such authority to act does not directly stem from S.C. Code § 40-33-25, but the authority comes from S.C. Code § 40-33-10(I).

The South Carolina Code is unclear as to who is required to bear the cost for the criminal records check. One could argue that because the department bears the cost of the criminal check for licensed nurses under S.C. Code § 40-33-25(B), licensed nurses who are not involved in an investigation or disciplinary proceeding but simply selected to participate in the finger-print based criminal records check should not be forced to bear the cost. However, another could argue that the nurses selected for the criminal records check are renewal applicants and should bear the cost like applicants under S.C. Code § 40-33-25(A).

Conclusion

It is the opinion of this office that the South Carolina Board of Nursing has the authority to instruct licensees to participate in a finger-print based criminal records check for state and federal government records.

The South Carolina Board of Nursing is expressly given the power to “develop minimum standards for continued competency of licensees,” “use minimum standards as a basis for evaluating safe and effective nursing practice,” and “collect any information the board considers necessary . . . to report disciplinary actions to national databanks of disciplinary information.” S.C. Code § 40-33-10(I)(2), (8), and (11). It is a logical conclusion that the South Carolina Board of Nursing has the implied

¹ S.C. Code § 40-33-25(A).

² S.C. Code § 40-33-25(B).

³ See, Beard Laney, Inc. v. Darby, 213 S.C. 380 (1948).

⁴ S.C. Code § 40-33-10(I)(2), (8), and (11).

The Honorable David L. Thomas
Page 6
August 30, 2010

authority to require licensees to undergo a finger-print based criminal records check. It is the opinion of this Office that S.C. Code § 40-33-25 is not in conflict with such action. As mentioned above, it is unclear who should bear the cost burden; hence, the board should attempt to interpret its own practice act, otherwise, legislative clarification may be necessary.

Sincerely,

Henry McMaster
Attorney General



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REVIEWED AND APPROVED BY:



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