The State of South Carolina

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Stephen S. Seeling, Executive Director
State Board of Medical Examiners
Post Office Box 12245
Columbia, South Carolina 29211

Dear Mr. Seeling:

By your letter of June 7, 1988, you have advised that Act No. 541 of 1988 recently amended Section 40-47-140, Code of Laws of South Carolina (1976, as revised). You have asked for the opinion of this Office as to the effect of Act No. 541 on the FLEX Examination standards of Regulations No. 81-80 and 81-90 of the Board of Medical Examiners. In particular, you ask whether the provision in Act No. 541 that no individual score be lower than 74 precludes the Board from granting permanent licensure to an applicant with a daily FLEX score under 74; further, you asked whether Board discretion is still permitted per Regulations 81-80 and 81-90, for applicants certified by an American Specialty Board with FWA of 75, if these applicants have an individual day score below 74.

Section 40-47-140 of the Code

Prior to amendment, Section 40-47-140 of the Code provided the following:

> The Board shall by rules and regulations establish minimum standards of performance to be attained on examinations for an applicant to qualify for a license.

Following amendment by Act No. 541, Section 40-47-140 provides:

> The board by regulation shall establish minimum standards of performance to be attained on examinations for an applicant to qualify for a license.
>
> For FLEX examinations taken before June 1, 1985, the applicant qualifies for a license if, in one sitting, he attained a score of at least seventy-five percent each day or a FLEX weighted average of seventy-five percent or better if no score on any individual part is lower than seventy-four.

Regulations of the Board

In pertinent part, Regulation 81-80 of the Board of Medical Examiners provides:

> For FLEX examinations taken prior to June 1, 1985, the following standards shall apply:
>
> > The applicant, in one sitting, must have attained a score of at least 75 each day and a FLEX weighted average of 75 or better; applicants licensed in other states who have a FLEX weighted average of 75 and do not meet the daily FLEX requirements of this Board may be considered for exemption if they are certified by an American Specialty Board and meet all other current requirements for licensure by this Board.
> > ...

This identical language is repeated in Regulation 81-90. On its face, Section 40-47-140 of the Code appears to conflict with the above-cited regulations.

Discussion

While the General Assembly may not delegate its power to make laws, that body may authorize an administrative agency such as the Board of Medical Examiners to prescribe rules and regulations to fill in the gaps for the complete operation and enforcement of the laws adopted by the General Assembly. Heyward v. South Carolina Tax Commission, 240 S.C. 347, 126 S.E.2d 15 (1962). As cited above, the General Assembly has, in Section 40-47-140 of the Code, authorized the Board to adopt certain rules and regulations as to minimum standards to be obtained on examinations for licensure. For FLEX examinations taken prior to June 1, 1985, however, the General Assembly appears to have set certain standards to be observed by the Board.

The South Carolina Supreme Court has stated that "[a]lthough a regulation has the force of law, it must fall when it alters or adds to a statute." Society of Professional Journalists v. Sexton, 283 S.C. 563, 567, 324 S.E.2d 313 (1984). In Sexton, a regulation of the Department of Health and Environmental Control limited the class of persons to whom a death certificate might be furnished, in contravention of a specific statute and the Freedom of Information Act. The court held the regulation invalid and repugnant to the Freedom of Information Act. The court noted that "[a]mending FOIA to restrict the class of persons to whom DHEC must furnish death certificates is a legislative function." Id. Applying the reasoning of Sexton, it is clear that a regulation which alters the mandate of a statute will be deemed invalid by the courts.

Other courts have stated that regulations of administrative agencies must be in harmony with the relevant enabling legislation. A regulation which was valid when promulgated will become invalid upon the enactment of a statute in conflict with the regulation. Scofield v. Lewis, 251 F.2d 128 (5th Cir. 1958); Sherman v. Higgins, 272 N.Y. 286, 5 N.E.2d 822 (1936); 2 Am. Jur. 2d Administrative Law §300.

Based on the foregoing, it appears that the terms of Act No. 541 of 1988, amending Section 40-47-140 of the Code, evidence a legislative intent to supersede Regulations 81-80 and 81-90 of the Board of Medical Examiners, to the extent that the regulations are inconsistent with the amended statute, with respect to FLEX examinations taken prior to June 1, 1985. The plain language of the act requires that the applicant attain a score of at least seventy-five percent each day or a FLEX weighted average of seventy-five percent or better if no score on an

individual part is lower than seventy-four. If an individual has an individual score below seventy-four percent, the statute appears to have no leeway for the exercise of discretion by the Board of Medical Examiners if an applicant should otherwise be certified by an American Specialty board; the plain terms of the act would preclude his licensure.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP:sds

REVIEWED AND APPROVED BY:

Robert D. Cook

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