

1976 S.C. Op. Atty. Gen. 50 (S.C.A.G.), 1976 S.C. Op. Atty. Gen. No. 4250, 1976 WL 22870

Office of the Attorney General

State of South Carolina

Opinion No. 4250

February 6, 1976

*1 Public health nurses may, under Act No. 287 of 1975, dispense all drugs except 'controlled substances' (drugs on Schedules I through V of the State and federal controlled substances acts), provided that such dispensing is done in connection with an existing public health care program, and provided that all other state and federal statutes and regulations concerning the dispensing of drugs are complied with.

The delegation by Act No. 287 of 1975 of legislative authority to the South Carolina Medical Association is invalid, but that portion of the act is severable.

TO: F. Joseph Hodge
Executive Secretary
South Carolina Board of Pharmaceutical Examiners

QUESTIONS PRESENTED:

I. Does Act No. 287 of 1975 contravene any of the following federal statutes or the regulations issued thereunder:

A. [21 U.S.C. Section 353](#) (misbranding of drugs)?

B. [21 U.S.C. Section 801 et seq.](#) (controlled substances)?

II. What is the effect of Act No. 287 of 1975 on existing state statutes?

III. Does Act No. 287 of 1975 provide for an unlawful delegation of legislative power?

IV. Are the invalid portions of the act severable?

AUTHORITIES CITED:

Statutes:

Act No. 257 of 1975

[21 U.S.C. Section 353](#)

[21 U.S.C. Section 301 et seq.](#)

[21 U.S.C. Section 801 et seq.](#)

S. C. Code Sections 32–1510.27, 56–1312

Regulations:

[21 C.F.R. Section 1304.01 et seq.](#)

[21 C.F.R. Section 1306.01 et seq.](#)

Other:

Regulation No. 2, South Carolina Board of Pharmaceutical Examiners

[United Citizens Party v. South Carolina State Election Commission](#), 319 F.Supp. 784, 787 (D.S.C. 1970).

[Lee v. Clark](#), 224 S.C. 138, 77 S.E.2d 485 (1953).

DISCUSSION OF ISSUES:

Act No. 287 of 1975, Acts of South Carolina, provides that the Department of Health and Environmental Control may establish policies whereby duly registered nurses under the direction of a physician and under the guidance of a registered pharmacist may dispense drugs in certain public health programs either now existing or to be approved in the future by the South Carolina Medical Association. The Act further provides that it shall not be construed to require the employment of registered pharmacists at local health clinics for such guidance. A number of questions have been raised as to the validity of the Act.

I. Does Act No. 287 of 1975 contravene any of the following federal statutes or the regulations issued thereunder:

A. [21 U.S.C. Section 353](#) (misbranding of drugs)?

[21 U.S.C. Section 353](#) provides in part that ‘drugs,’ as defined, . . . shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

*2 It is clear both from the language of the statute and from the cases arising under it that its primary purpose is to prohibit the dispensing of drugs without a prescription from a physician. The only mention of pharmacists in this statute is in the provision that the prescription shall be reduced to writing and ‘filed by the pharmacist.’ The term ‘pharmacist’ is not defined in any portion of the Food, Drug, and Cosmetic Act ([21 U.S.C. Section 301 et seq.](#)), of which [21 U.S.C. Section 353](#) is a part, and it would appear that [21 U.S.C. Section 353](#) only requires that prescriptions be filed by any person licensed by a state to dispense them. Thus, the provision of Act No. 287 that the dispensing be ‘under the direction of a physician . . .’ must be read as requiring a prescription each time drugs are dispensed by the nurses. However, the Federal Food, Drug, and Cosmetic Act contains no provision which would indicate a federal intent to prescribe the standard for licensure of the persons who dispense drugs. This matter has clearly been left to the states. Thus, if a person authorized by the state to dispense drugs does so pursuant to a prescription, and files a record of each prescription filled by him, the requirements of [21 U.S.C. Section 353](#) will have been met.

B. [21 U.S.C. Section 801 et seq.](#) (controlled substances)?

A federal definition of ‘pharmacist’ is to be found in federal regulations ([21 C.F.R. Section 1304.01 et seq.](#) and [21 C.F.R. Section 1306.01 et seq.](#))¹ promulgated pursuant to [21 U.S.C. Sections 827, 829, and 958\(d\)](#). That definition arises in connection with

statutes and regulations concerning ‘controlled substances,’ defined in [21 U.S.C. Section 802\(6\)](#) as drugs or other substances included in schedules I, II, III, IV, or V, which are found elsewhere in the controlled substances act. It cannot be said to cover situations other than those involving controlled substances. However, existing public health care programs do sometimes involve prescriptions for controlled substances (e.g., amphetamines), and by clear implication, Act No. 287 authorizes nurses to dispense controlled substances when they are so prescribed.² The only question is whether or not ‘the guidance of a registered pharmacist’ whom the act does not require to be employed at the local health clinic amounts to ‘the supervision of a pharmacist,’ as the federal regulations require. Although the question is rather close, it is the opinion of this Office that the regulations impose a standard amounting to direct personal supervision, with the licensed pharmacist at least working under the same roof as the authorized non-pharmacist. The example given by the regulations, that of a pharmacy intern, contemplates personal supervision (see, e.g., Regulations, South Carolina Board of Pharmaceutical Examiners, Regulation 2). No such supervision is contemplated by Act No. 287, since that act requires no in-house pharmacist. It is thus the opinion of this Office that insofar as Act No. 287 may be construed to permit persons not under personal supervision of pharmacists to dispense controlled substances, such an interpretation of that act would contravene express federal policy and be void under the Supremacy Clause of the [U. S. Constitution \(Article 6, cl. 2\)](#).

II. What is the effect of Act No. 287 of 1975 on existing state statutes?

*3 Act No. 287 very clearly provides that registered nurses may dispense drugs in public health care programs and that while the guidance of a registered pharmacist should be had, it is not necessary for local health clinics to hire pharmacists. As a result, Act No. 287 clearly contravenes S. C. Code Section 56–1312.³ Although Act No. 287 makes no direct reference to Section 56–1312, it must be deemed to effect a partial repeal of that section by implication. No harmonization of the two statutes is possible, since the earlier one permits no one other than pharmacists to dispense drugs while the later one undeniably makes an exception to that rule. However, this exception only concerns the question of who may dispense drugs; it cannot be read as exempting the nurses from any state or federal law requiring pharmacists (i.e., anyone authorized to dispense drugs) to file prescriptions, provide certain types of packaging, etc. All such laws still apply to the nurses.

III. Does Act No. 287 of 1975 provide for an unlawful delegation of legislative power?

There remains a question as to whether the act improperly delegates to a private body the power to approve programs. The act applies to certain named public health care programs and to ‘any other public health program now existing, or approved by the South Carolina Medical Association.’ The South Carolina Medical Association is a private, voluntary association of physicians, with roughly half the physicians in the State as members. It is in no way an agency or arm of the State. In [United Citizens Party v. South Carolina State Election Commission, 319 F.Supp. 784, 787 \(D.S.C. 1970\)](#), the court stated that:

It is a black letter rule now so firmly fixed that it is found in legal encyclopedias that a legislature may not delegate legislative functions to private persons or associations. 16 Am.Jur.2d ‘Constitutional Law’ Section 249.

The present situation involves a private association exercising the purest form of legislative (as opposed to executive or administrative) power: the power to carve exceptions to the South Carolina pharmacy laws as often as new public health programs are conceived. The General Assembly may properly exercise this power, but it may not delegate it to a private body. It is thus the opinion of this Office that the provision for approval of new programs by the Medical Association makes an unconstitutional delegation of legislative power.

IV. Are the invalid portions of the act severable?

There is some question as to the severability of the provision for approval of new programs by the S. C. Medical Association. However, the clearly-valid portions of the act, which portions relate to existing public health programs, can stand on their own even though no provision for future programs would exist. The valid and invalid provisions of the act are not mutually dependent upon each other. See [Lee v. Clark, 224 S.C. 138, 77 S.E.2d 485 \(1953\)](#).

CONCLUSIONS:

*4 For the reasons stated above, it is the opinion of this Office that:

- 1) Public health nurses may, under Act No. 287 of 1975, dispense all drugs except 'controlled substances' (drugs on Schedules I through V of the state and federal controlled substances acts), provided that such dispensing is done in connection with an existing public health care program, and provided that all other state and federal statutes and regulations concerning the dispensing of drugs are complied with.
- 2) The delegation by Act No. 287 of 1975 of legislative authority to the South Carolina Medical Association is invalid, but that portion of the act is severable.

Kenneth P. Woodington
Assistant Attorney General

Footnotes

- 1 'The term 'pharmacist' means any pharmacist licensed by a State to dispense controlled substances, and shall include any other person (e.g., a pharmacist intern) authorized by a State to dispense controlled substances under the supervision of a pharmacist licensed by such State.'
- 2 The act provides for the dispensing of 'drugs' by nurses. 'Controlled substances' are certain varieties of drugs; see [21 U.S.C. Section 802\(6\)](#) and its identical South Carolina counterpart, Section 32-1510.27.
- 3 'Section 56-1312. It shall be unlawful for anyone, except a registered pharmacist under this chapter

(b) to have charge of, engaging or carry on . . . the dispensing . . . of any medicinal drugs.'
1976 S.C. Op. Atty. Gen. 50 (S.C.A.G.), 1976 S.C. Op. Atty. Gen. No. 4250, 1976 WL 22870