1981 WL 157783 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
May 14, 1981

***1** Edward L. Sessions, D.C.
Chairman
South Carolina Board of Chiropractic Examiners
2835 Rivers Avenue
Charleston, South Carolina 29405

Dear Dr. Sessions:
You have requested an opinion from this Office concerning three proposed regulations by the South Carolina Board of Chiropractic Examiners. With respect to Proposed Regulation 25-8, I had previously advised that that proposed Regulation be deleted because it did not appear that the Board has the authority to define the scope of practice of chiropractic. You have suggested that the statutory provision authorizing the Board to adopt 'regulations concerning patient care and treatment' permits the Board to define the scope of practice of chiropractic. It is the opinion of this Office that the Board was not thereby granted the authority to define the scope of practice of chiropractic.

The General Assembly has defined the scope of practice of chiropractic as the spinal analysis (i.e., by physical examination, use of x-rays, and procedures generally used in the practice of chiropractic) of any interference with normal nerve transmission and expression and by adjustment to the articulations of the vertebral column and its immediate articulations . . ..' § 40-9-10, S.C. CODE, 1976. Thus chiropractic practice is limited, by statute, to analysis of the spine and to adjustment to the articulations of the vertebral column and immediate articulations. Health care treatment outside this area would fall outside the jurisdiction of the Board of Chiropractic Examiners.

Proposed Regulation 25-8, however, would authorize persons licensed by the Board to practice chiropractic 'in accordance with the method, thought, and practice of chiropractic, as taught in [a recognized Chiropractic College which is accredited by or has recognized candidate status with the Council on Chiropractic Education or its succession or an accredited agency approved by the State Commission on Higher Education.]' If this proposed regulation would allow a licensee to engage in health care treatment outside the analysis of the spine and adjustment of the vertebral column and its immediate articulations, then that would extend beyond the statute permitting the practice of chiropractic in this State, as that practice is defined by law.

It is argued that the Board has been given the authority to define the scope of practice of chiropractic by the statutory provision authorizing it to adopt regulations not inconsistent with the law concerning patient care and treatment. § 40-9-30(3), Id. But that provision does not clearly give the Board the authority to define the scope of practice of chiropractic. This conclusion is especially compelling in light of the recent decision in Bauer v. State, 267 S.C. 224, 227 S.E.2d 195 (1976), in which the Court held that the Board of Examiners, as it was then constituted, did not possess the statutory authority to define the scope of practice of chiropractic. Although that case was decided under an earlier statute the new Board has not expressly been given that power either. At most it can only be argued that 'patient care and treatment' was intended to encompass the 'scope of practice of chiropractic.' It is a general rule of law that an administrative agency possesses only those powers conferred either expressly, or by necessary implication. 2A Sutherland, STATUTORY CONSTRUCTION, § 65.02. Since the Board has not been given the power, either expressly or by necessary implication, to define the scope of practice of chiropractic, it is the opinion of this Office that it may not do so by regulation. Any regulation which attempts to define the scope of practice inconsistent in any way with its statutory definition, § 40-9-10, Id., would be beyond the authority of the Board.

***2** In this regard it should be noted that the law does permit a licensed chiropractor to undertake spinal analysis by means of 'procedures generally used in the practice of chiropractic.' § 40-9-10(b) and (c), Id. Those procedures may by regulation be defined to include the method, thought, and practice of chiropractic as taught in chiropractic schools. But these procedures must, by law, be limited to spinal analysis. Id.. Any other regulations concerning patient care and treatment, outside this area of spinal analysis, must be limited generally to the 'adjustment to the articulations of the vertebral column and its immediate articulations. . . .' § 40-9-10(b), Id.

Proposed Regulation 25-10 addresses several subject. First it would authorize licensees to take certain actions with respect to communicable diseases, to attest to a patient's disability impairment, and to sign death certificates. The first and third activities would be beyond the statutory definition of chiropractic practice insofar as they go beyond spinal analysis and articulation of the vertebral column. See § 40-9-10(c), Id. The second would be permitted insofar as it relates to spinal analysis. You have noted that the South Carolina Supreme Court has permitted a chiropractor to be qualified as an expert medical witness to testify in court as to injuries observed in the course of his analysis and treatment of a patient. Daniels v. Bernard, 270 S.C. 51, 240 S.C.2d 518 (1978). The Board could not by regulation, however, compel any non-licensee to accept a medical evaluation of disability made by a chiropractor, since there is no statutory authority for such a regulation and since the Board regulates only licensed chiropractors. Conceivably the Board could adopt a regulation governing the manner in which a chiropractor would determine the disability of a patient. But the Board could not, by regulation, compel any person or entity to accept the evaluation made by the chiropractor.

In addition, proposed Regulation 25-10 deals with x-rays and laboratory results being obtained from a hospital by a licensed chiropractor. Although this objective may be desirable, and may perhaps even be compelled in some form by a court pursuant to § 44-7-770, Id., the Board does not have the statutory authority to adopt regulations to compel action by any person or entity not regulated by the Board. Since the Board has no statutory authority over hospitals any regulation such as this requiring action by a hospital or affecting property rights of a hospital would be beyond the authority of the Board to promulgate.

Finally, as to proposed Regulation 25-12, I had previously advised that it would be preferable for the Board itself to approve chiropractic machines, rather than to delegate this responsibility to other entities. As a further matter, however, this proposed Regulation may involve an unconstitutional delegation of legislative power, in violation of Art. 3, § 1, SOUTH CAROLINA CONSTITUTION. The General Assembly has delegated the authority to the Board to approve any machine used in 'chiropractic practice' or 'analysis.' § 40-9-10(d), Code of Laws of South Carolina, 1976 (as amended). The Board, in turn, is attempting to delegate this decision to certain chiropractic colleges.

***3** The South Carolina Supreme Court has held that legislative power may not be delegated by the General Assembly to other entities without providing ascertainable standards to guide that entity. State v. Watkins, 259 S.C. 185, 191 S.E.2d 135 (1972); see also Gold v. South Carolina Board of Chiropractic Examiners, 271 S.C. 74, 245 S.E.2d 117 (1978). The prohibition against delegation of power imposed by the constitution upon a legislature applies with equal if not greater force to an administrative agency created by the legislature. 2 Am.Jur.2d, 'Administrative Law,' § 221. In this instance the Board has not been authorized, either by statute or by the constitution, to delegate the approval of chiropractic machines to any other entity. Therefore, this proposed regulation would most probably be an unconstitutional delegation of legislative power by the Board and would, therefore, be void.

It is recognized that the task facing the Board would be great if it must separately approve each machine since there are a large number of such machines. Perhaps this burden could be eased if the Board would approve machines by categories. These categories must, however, be sufficiently well-defined that it would be clear whether or not a particular machine had in fact been approved by the Board.

I hope that this will be of assistance to the Board. Please let me know if I can provide further assistance in this matter.
Sincerely,

David C. Eckstrom

Assistant Attorney General

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