

Attorney General Opinion 99-06

HOMEOPATHIC MEDICINE; PHARMACY BOARD; CONTROLLED SUBSTANCES:

The Homeopathic Medicine Board's regulation allowing for the prescription of pharmaceutical preparations is invalid. The regulation exceeds the grant of statutory authority delegated to the Homeopathic Medicine Board in light of the Legislature's 1997 action on A.B. 286 deleting pharmaceutical medicine from the definition of homeopathy.

Carson City, February 11, 1999

Mr. Keith W. Macdonald, Executive Secretary
Nevada State Board of Pharmacy
1201 Terminal Way, #212
Reno, Nevada 89502-3257

Dear Mr. Macdonald:

You have posed the following question.

QUESTION

May a singly licensed homeopathic physician prescribe controlled substances as defined in NRS chapter 453 or dangerous drugs as defined in NRS chapter 454 as "pharmaceutical preparations" within the nontraditional therapies described in revised Homeopathic Board regulation LCB File No. R213-97?

ANALYSIS

In the 1997 Legislative Session, the Homeopathic Board (Board) proposed a bill expanding the definition of homeopathic medicine and homeopathy. A portion of the first draft of A.B. 286 set forth:

"Homeopathic medicine" or "homeopathy" means a system of medicine employing substances of animal, vegetable, chemical or mineral origin, including, without limitation:

2. Noninvasive electrodiagnosis, cell therapy, neural therapy, herbal therapy, neuromuscular integration, orthomolecular therapy, nutrition, intravenous infusion, chelation therapy and pharmaceutical medicine. (Emphasis added.)

While testifying in legislative committee in support of this proposed language, Board member, Dr. Fuller Royal, stated his belief that the Board was competent to decide whether licensees or applicants who came before the Board were qualified to write prescriptions for anti-inflammatory or antibiotic medications. Dr. Royal stated the practice of homeopathic medicine did not call for the use of the above mentioned medications. Nevertheless, if a physician was singularly licensed under the Board, a patient needing a prescription would have to go to another physician in order to obtain the prescription. Dr. Royal thought this procedure was unnecessary. See Hearing on A.B. 286 Before the Assembly Committee on Commerce, 1997 Legislative Session, (March 31, 1997).

After the Assembly Committee on Commerce heard strong objections from the Nevada Medical Association and other allopathic physicians on the subject of singly licensed homeopathic physicians prescribing controlled substances and dangerous drugs, the Legislature deleted all of the language highlighted above in the first draft of A.B. 286. After the amended version of A.B. 286 was enacted in 1997, the definition of "homeopathic medicine" and "homeopathy" set forth in NRS 630A.040 read as follows:



"Homeopathic medicine" or "homeopathy" means a system of medicine employing substances of animal, vegetable, chemical or mineral origin, including:

1. Nosodes and sarcodes, which are:

(a) Given in micro-dosage, except that sarcodes may be given in macro-dosage;

(b) Prepared according to homeopathic pharmacology by which the formulation of homeopathic preparations is accomplished by the methods of Hahnemannian dilution and succussion or magnetically energized geometric patterns applicable in potencies above 30X, as defined in the official Homeopathic Pharmacopoeia of the United States; and

(c) Prescribed by homeopathic physicians or advanced practitioners of homeopathy according to the medicines and dosages in the Homeopathic Pharmacopoeia of the United States, in accordance with the principle that a substance which produces symptoms in a healthy person can eliminate those symptoms in an ill person.

2. Noninvasive electrodiagnosis, cell therapy, neural therapy, herbal therapy, neuromuscular integration, orthomolecular therapy and nutrition.

The amended version of NRS 630A.040 did not include the terms intravenous infusion, chelation therapy, and pharmaceutical medicine within the definition of "homeopathic medicine" and "homeopathy."

In December 1997, the Board adopted regulations within the Nevada Administrative Code (NAC) describing the nontraditional therapies set forth within NRS 630A.040(2). The descriptions of neural therapy and orthomolecular therapy both included the ability for homeopathic physicians to use pharmaceutical medicines. The descriptions of these nontraditional therapies set forth in part:

Neural therapy. 1. Neural therapy is the use of any or all local anesthetics, vitamins, minerals, homeopathic medications, herbal extracts or any other medicinal or pharmaceutical substance for intravenous injection, for injection into acupuncture, acupressure, or trigger points, or into nerve ganglia.

Orthomolecular therapy. Orthomolecular therapy is the treatment and prevention of disease by the expert adjustment of the body's natural chemical constituents on the molecular level, and includes:

1. The prescription of topical and oral supplements, pharmaceutical medicines, the intravenous infusion of various substances, including vitamins, amino acids, peptides, polypeptides, pharmaceutical medications, homeopathic medications, ozone and other bio-oxidative substances, chelating agents such as . . . (EDTA), . . . (DMSO),

This regulation, LCB File No. R213-97 was considered by the Legislative Commission on June 26, 1998. After hearing from various medical professionals, the Legislative Commission voted to object to the regulation as exceeding the grant of statutory authority delegated to the Board. Commission members expressed concerns that allowing a singly licensed homeopathic physician to prescribe and dispense pharmaceutical medicine would improperly expand the jurisdiction of the Board beyond the 1997 Legislature's definition of homeopathic medicine. See Minutes of the Legislative Commission (June 26, 1998).

The Board thereafter revised the regulations and adopted them in their present form. Revised LCB File No. R213-97 contained language allowing homeopathic physicians to use "pharmaceutical preparations," instead of "pharmaceutical medicines," in conjunction with neural therapy and orthomolecular therapy. The revised regulation set forth in part:

(b) "Neural therapy" to mean the injection of vitamins, minerals, homeopathic medications, herbal extracts or other medicinal or pharmaceutical preparations into the:

(1) Acupuncture, acupressure or trigger points; or

(2) Ganglia, of a patient to control pain or produce other beneficial effects

(d) "Orthomolecular therapy" to mean the treatment and prevention of disease, including, without limitation, infection, malignancy and degenerative illness, by adjusting the natural chemical constituents of the body on the molecular level. The term includes, without limitation:

(1) The prescription of topical and oral supplements and pharmaceutical preparations; and

(2) The intravenous infusion of vitamins, amino acids, peptides, polypeptides, pharmaceutical preparations, homeopathic medications, ozone, bio-oxidative substances or chelating agents, . .

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(c) "Pharmaceutical Preparations" does not include narcotic drugs or opiates that are listed as schedule II controlled substances pursuant to chapter 453 of NRS, except as those substances may be described for use in the official Homeopathic Pharmacopoeia of the United States.

The Legislative Commission reviewed the revised Board regulation on December 18, 1998. Much of the discussion in this Legislative Commission hearing centered on the phrase "pharmaceutical preparations" and what was meant by the use of that phrase within the regulation. From this discussion, it appeared that there was an intent within the revised regulation to allow a singly licensed homeopathic physician to, at least in some limited fashion, prescribe some controlled substances as listed in NRS chapter 453 and dangerous drugs as listed in NRS chapter 454. The Legislative Commission neither approved nor objected to the revised regulation due to the divided nature of the votes within the Commission.

You have requested the present legal opinion because the term "pharmaceutical preparations" is not typical of the terms used within NRS chapters 453 and 454. Board members clarified in the Legislative Commission hearing an intent to interpret the phrase "pharmaceutical preparations" as permitting a singly licensed homeopathic physician to prescribe some controlled substances and dangerous drugs as listed within NRS chapters 453 and 454. We believe this interpretation renders the regulation invalid because the Legislature specifically denied the power for singly licensed homeopathic physicians to prescribe such controlled substances and dangerous drugs through the 1997 legislation on A.B. 286. The regulation cannot restore a power that the Legislature specifically took out of a piece of legislation.

A regulation is invalid if it exceeds the statutory authority delegated by the Legislature to an administrative agency. NRS 233B.110. When the Legislature specifically deleted the term "pharmaceutical medicine" from the definition of homeopathy, its clear intent in enacting the remainder of A.B. 286 was to prohibit the singly licensed homeopathic physician from having the ability to prescribe controlled substances and dangerous drugs in the same manner as an allopathic physician. The Board could not, under the guise of interpreting nontraditional therapies, extend the prescription power back into NRS chapter 630A and thereby give the statutes expanded effect beyond the grant of the Legislature's delegated authority. *Boulware v. State, Dept. Human Resources*, 103 Nev. 218, 737 P.2d 502 (1987); *Hager v. Nevada Medical Legal Screening Panel*, 105 Nev. 1, 767 P.2d 1346 (1989).

CONCLUSION

If singly licensed homeopathic physicians find the need to prescribe controlled substances or dangerous drugs as listed within NRS chapters 453 and 454, they should obtain a clear grant of such power through statutory amendments made by the Legislature. To date, the Legislature has specifically denied such power to singly licensed homeopathic physicians. Revised NAC regulation LCB File No. R213-97 exceeds the scope of delegated statutory authority and is therefore invalid. We believe that our conclusion in Op. Nev. Att'y Gen. No. 93-21 (September 20, 1993), continues to accurately describe the limited ability of singly licensed homeopathic physicians to possess, dispense, and administer controlled substances and dangerous drugs.

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