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ATTORNEY GENERAL OPINION NO. 90- 36

Mary Ann Gabel
Executive Director
Behavioral Sciences Regulatory Board
900 S.W. Jackson, Room 855-S
Topeka, Kansas 66612

Re: Public Health -- Social Workers -- Licensure;
Delegating Licensing Function

Synopsis: The Behavioral Sciences Regulatory Board may delegate to its staff the task of issuing licenses to practice social work if there is no discretion involved in completing the ministerial task. If executive/legislative discretion must be applied, such delegation is proper when attended with adequate safeguards and standards to guide the exercise of discretion. If issuing or denying a license involves the exercise of discretion as it pertains to personal fitness, the determination of fitness may be delegated provided there is an avenue for relief through an appellate process.
Cited herein: K.S.A. 1989 Supp. 65-6309;
65-6311; K.S.A. 77-421; K.A.R. 102-2-7.

* * *

Dear Ms. Gabel:

On behalf of the Behavioral Sciences Regulatory Board you have requested our opinion concerning social work licensure. Specifically you ask whether the board may delegate its

authority for issuing social work licenses and temporary licenses to the agency's staff members.

Initially we note that the delegation (or non-delegation) principle involves a distinction between the types of authority being delegated as well as between the types of entities to which authority is being delegated. Governmental functions can be categorized as legislative, judicial and executive. Quoting Justice Holmes' opinion in Prentice v. Atlantic Coast Line, 211 U.S. 210, 226, 53 L.Ed. 150, 158 (1980), our Court stated in Gawaith v. Gage's Plumbing & Heating Co., Inc., 206 Kan. 169 (1970):

"'. . . A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. . . ."
206 Kan. at 178.

Administrative agencies, as part of the executive branch of government, execute, administer, and enforce the laws of the state, and may perform other functions delegated to them. The business of licensing is chiefly executive/legislative, not judicial. Kansas State Board of Healing Arts v. Foote, 200 Kan. 447, 450, 451 (1968). Once an individual acquires qualifications for licensure under existing rules, and no grounds for disqualification based on personal fitness are known, licensing becomes a ministerial task and one which is without regard to the agency's judgment or opinion concerning the propriety of granting a license. The matter becomes adjudicative in nature (quasi-judicial) when a determination of personal fitness for licensure is to be made. See e.g. Rydd v. State Board of Health, 202 Kan. 721, 726 (1969).

The Kansas Supreme Court has consistently held that legislative authority may not be delegated to private groups, associations or individuals. See Gumbhir v. Kansas State Board of Pharmacy, 228 Kan. 579 (1980) (restricting approval for examination and registration to individuals graduating from schools of pharmacy accredited by a nongovernmental agency unconstitutional); State v. Crawford, 104 Kan. 141 (1919) (requiring all electrical wiring to be

in accordance with national electrical code unconstitutional). See also Poe v. Menghini, 339 F.Supp. 986 (D.Kan. 1972) (requiring abortions to be performed only in state-licensed hospitals accredited by Joint Commission on Accreditation of Hospitals unconstitutional). These instances of delegation must be distinguished from legislation which adopts standards promulgated by private groups which standards are already in existence. See e.g. North American Safety Valve Industries, Inc. v. Wolgast, 672 F.Supp. 488 (D.Kan. 1987) (adopting by reference existing inspection code of private organization not unconstitutional, changes in code would not change state law).

In comparison, legislative authority may be delegated to coordinate branches of government, as in Missouri Pacific Railroad Company v. McDonald, 207 Kan. 744 (director of revenue administering income tax statutes and computing income and refunds) or to subordinate branches of government, as in State ex rel. Tomasic v. City of Kansas City, 237 Kan. 572 (1985) (local legislation authority in matters of local concern not unconstitutional). However, such delegation must include sufficient standards or safeguards to guide the exercise of power. Boswell, Inc., d/b/a Broadacres v. Harkins, 230 Kan. 738, 740 (1982); 1 K. Davis, Administrative Law Treatise (Supp. 1982) § 3:14.

While the delegation of legislative authority requires standards or safeguards, the delegation of executive authority is less vigorously guarded. Such a delegation is not inappropriate as long as the delegating entity retains the final decision-making authority. Marjorie Webster Jr. Col., v. Middle States Ass'n of C&S.S., 432 F.2d 650, 655 (D.C. Cir. 1970) cert. denied, 91 S.Ct. 367.


If an applicant meets the qualifications established by statute and by regulations of the board, the board is directed to issue a license to practice social work. K.S.A. 1989 Supp. 65-6306, K.S.A. 1989 Supp. 65-6309. If an application shows the applicant has not met the requirements, a license is not to be granted. In these cases, there is no discretion involved, and therefore no real delegation occurs. This is simply a matter of carrying out the ministerial task, and this may be accomplished by the office staff. If a decision-making process involving executive/legislative discretion is required to grant a license, such may be delegated if the delegation is attended by adequate standards for the exercise of authority.

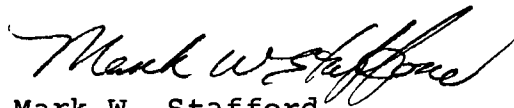
A license application may be denied for "unfitness", as provided in K.S.A. 1989 Supp. 65-6311(a) and K.A.R. 102-2-7(b) (unprofessional conduct, defined). Making this finding is a quasi-judicial task. The quasi-judicial task of determining unfitness for licensure may be delegated, but there must be an avenue of relief through an appellate process.

Finally, we note that the delegation of authority may be limited by statute, as in K.S.A. 77-421(d) which requires a roll call vote of the majority of a board's total membership to adopt regulations. In those cases where a matter is committed to agency discretion, and where a statute requires the personal exercise of discretion by the agency head, the actual decision must be rendered by the agency head.

In conclusion, it is our opinion that the Behavioral Sciences Regulatory Board may delegate to its staff the task of issuing licenses to practice social work if there is no discretion involved in completing the ministerial task. If executive/legislative discretion must be applied, such delegation is proper when attended with adequate standards and safeguards to guide the exercise of discretion. If issuing or denying a license involves the exercise of discretion as it pertains to personal fitness, the determination of fitness may be delegated provided there is an avenue for relief through an appellate process.

Very truly yours,


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