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ATTORNEY GENERAL OPINION NO. 83- 15

Ms. Mary Ann Gabel
Executive Secretary
Behavioral Sciences Regulatory Board
535 Kansas, Room 1102
Topeka, Kansas

Re: State Departments; Public Officers, Employees --
Licensing of Social Workers -- Licensure Requirements
of Federal Employees and Social Work Designees

State Boards, Commissions and Authorities -- Behavioral
Sciences Regulatory Board -- Social Work Licensure
Requirements for Federal Employees and Social Work
Designees

Mentally Ill, Incapacitated, Dependent Persons --
Adult Care Homes -- Social Work Licensure Requirements
for Social Services Designees

Synopsis: A person practicing social work in a Veterans Administration
hospital does not have to be licensed by the State of Kansas,
absent such a requirement being imposed by the hospital
administrator.

The current provisions of paragraphs 2 and 3 of K.A.R.
1982 Supp. 28-39-76(11) and the provisions of K.A.R. 1982
Supp. 28-39-94(b) are inconsistent with the provisions
of K.S.A. 1982 Supp. 75-5348. Thus, notwithstanding the
provisions of these administrative rules and regulations,

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persons who are social services designees under these rules and regulations, but who are not licensed under the Licensure of Social Workers Act, K.S.A. 75-5346 et seq., and who engage in social work practice, or who participate in the delivery of social work services while not under the supervision of a licensed social worker, are engaged in activity violating K.S.A. 1982 Supp. 75-5348(a). Cited herein: K.S.A. 39-923, K.S.A. 1982 Supp. 75-5347, 75-5348, 75-5354, 38 U.S.C. §§210, 4101, 4105, K.A.R. 1982 Supp. 28-39-76, 28-39-94.

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Dear Ms. Gabel:

On behalf of the Behavioral Sciences Regulatory Board, you have requested our opinion concerning two related questions of licensure requirements for social workers. You first ask whether federal employees engaged in social work practice at the Veterans Administration Medical Centers in Kansas are required to be licensed by the Board pursuant to K.S.A. 1982 Supp. 75-5347. Second, you ask whether K.A.R. 1982 Supp. 28-39-76 and 28-39-94, which relate to the provision of social work services to residents of adult care homes, contravene the Licensure of Social Workers Act, K.S.A. 75-5346 et seq.

K.S.A. 1982 Supp. 75-5347(b) defines "social work practice" thusly:

"'Social work practice' means the professional activity of helping individuals, groups or communities enhance or restore their capacity for physical, social and economic functioning and the professional application of social work values, principles and techniques in areas such as psychotherapy, social service administration, social planning, social work consultation and social work research to one or more of the following ends: Helping people obtain tangible services; counseling with individuals, families and groups; helping communities or groups provide or improve social and health services; and participating in relevant social action. The practice of social work requires knowledge of human development and behavior; of social, economic and cultural institutions and forces; and of the interaction of all these factors. Social work practice includes the teaching of relevant subject matter and of conducting research into problems of human behavior and conflict."

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K.S.A. 1982 Supp. 75-5348 prohibits any person from engaging in the practice of social work for compensation or holding forth as performing the services of a social worker, unless such person is duly licensed by the Board. K.S.A. 1982 Supp. 75-5348 and 75-5354 enumerate certain exemptions from the social work licensure requirements; however, none of these includes federal employees who work at federal facilities or persons who engage in social work practice at an adult care home.

The Federal Congress, in 38 U.S.C. §4105, has established qualifications for appointees to the Department of Medicine and Surgery in Veterans Administration (VA) hospitals. Said statute requires certain professionals, i.e., physicians, dentists, nurses, podiatrists, optometrists and pharmacists, to be licensed in "a state," but does not require them to be licensed in the state in which the hospital is located. There are no licensure requirements specified for allied professions, such as physical therapists, occupational therapists, social workers, dieticians or other personnel. Instead, Congress has delegated to the administrator of the hospital the power to prescribe the scientific and technical qualifications of persons who engage in these allied professions in the hospital. 38 U.S.C. §4105(8). The question has arisen, however, whether the State of Kansas may impose its licensure requirements upon federal employees practicing social work exclusively in a VA hospital, absent such a requirement being imposed by the hospital administrator.

In resolving this question, it is necessary to recognize that VA hospitals are established, operated and maintained pursuant to federal law. 38 U.S.C. §4101(a). Also, pursuant to federal law, such hospitals are under the supervision of the VA. 38 U.S.C. §210(a). Therefore, there can be no doubt that these hospitals are instrumentalities of the federal government, similar to other institutions established by federal law. See, e.g., Home Owners' Loan Corp. v. Anderson, 145 Kan. 209 (1937), Smith v. Kansas City Title & T. Co., 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577 (1921) and Federal Land Bank v. Priddy, 295 U.S. 229, 55 S.Ct. 705, 79 L.Ed. 1408 (1935).

The general rule regarding the applicability of state licensure laws to federal instrumentalities was set forth in Johnson v. Maryland, 254 U.S. 51, 41 S.Ct. 16, 65 L.Ed. 126 (1920). In concluding that there is an absence of power on the part of the states to regulate federal instrumentalities in regard to matters of administration which are approved by the federal authority, the Supreme Court said:

"It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed." 254 U.S. at 56, 57.

Thus, it is our opinion that the federal government alone may prescribe the requirements for social workers practicing within the confines of a federal institution and the State of Kansas may not impose licensure requirements upon these employees.

We now consider the question of whether K.A.R. 1982 Supp. 28-39-76 and 28-39-94, which are administrative rules and regulations promulgated by the Secretary of Health and Environment pursuant to the Adult Care Home Licensure Act, K.S.A. 39-923 et seq., are consistent with the Licensure of Social Workers Act, K.S.A. 75-5346 et seq. K.A.R. 1982 Supp. 28-39-94 provides:

"(a) The facility shall have the methods for identifying the medically-related psychosocial needs of the resident. The medically-related psychosocial needs of the resident shall be identified by qualified staff of the facility or by referral to a qualified outside resource through established procedures.

"(b) If the facility offers social services, a member of the staff shall serve as social services designee. If the social services designee is not a social worker, a written agreement shall be made with a social worker or recognized social agency for consultation, on a scheduled basis, regarding these services. If the facility does not offer social services, it shall have written procedures for referring residents to qualified outside resources.

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"(c) The facility, as part of the resident care plan, shall assist each resident to adjust to the social and emotional aspects of the resident's illness, treatment, and stay in the facility." (Emphasis added.)

K.A.R. 1982 Supp. 28-39-76(11) defines "social services designee" as "a person who is a:

- "1. Social worker; or
- "2. College graduate and has completed a program in social work education; or
- "3. Nurse aide and has completed a course approved by the Kansas department of health and environment in social services and has consultation from a social worker." (Emphasis added.)

At this point, we note that K.S.A. 1982 Supp. 75-5348(a) provides that a person, who is not licensed under the Social Workers Act, may "participate in the delivery of social work service . . . [if the person is] under the supervision of a person who is licensed under this act." (Emphasis added.) It is apparent, however, that K.A.R. 1982 Supp. 28-39-94 does not require the persons identified in paragraphs 2 and 3 of K.A.R. 1982 Supp. 28-39-76(11) (non-licensed persons) be under the supervision of a person licensed under the Social Workers Act. Instead, it merely requires that these persons have "consultation, on a scheduled basis," with a social worker. "Consultation" is not synonymous with "supervision." Thus, persons identified in paragraphs 2 and 3 of K.A.R. 1982 Supp. 28-39-76(11) do not come within the language of K.S.A. 1982 Supp. 75-5348(a), quoted above, and cannot be said to be participating in the delivery of social work service, under the supervision of a person licensed under the Licensure of Social Workers Act. Consequently, we are of the opinion that any person identified in paragraphs 2 or 3 of K.A.R. 1982 Supp. 28-39-76(11), who engages in social work practice, or who participates in the delivery of social work services while not under the supervision of a licensed social worker, is in violation of the provisions of K.S.A. 1982 Supp. 75-5348(a).

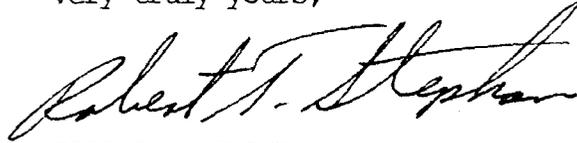
Therefore, in response to your second inquiry, we are constrained to conclude that the current provisions of paragraphs 2 and 3 of K.A.R. 1982 Supp. 28-39-76(11) and the provisions of 28-39-94(b) are inconsistent with the provisions of K.S.A. 1982 Supp. 75-5348. Thus, notwithstanding

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the provisions of these administrative rules and regulations, it is our opinion that persons who are social services designees under these rules and regulations, but who are not licensed under the Licensure of Social Workers Act and who engage in social work practice, or who participate in the delivery of social work services while not under the supervision of a licensed social worker, are engaged in activity violating K.S.A. 1982 Supp. 75-5348(a).

In closing, we note that minor amendment to the provisions of K.A.R. 1982 Supp. 28-39-94(b) would harmonize the provisions of that rule and regulation with the provisions of K.S.A. 1982 Supp. 75-5348(a).

Very truly yours,



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