



STATE OF KANSAS

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May 2, 1986

ATTORNEY GENERAL OPINION NO. 86- 64

Lynn E. Ebel
Kansas State Board of Pharmacy
503 Kansas Avenue, Suite 328
Topeka, Kansas 66601

Re: Public Health -- Examination and Registration of
Pharmacists -- Rules and Regulations; Patient
Profile Records

Synopsis: The Board of Pharmacy does not have authority to
promulgate a regulation mandating patient profile
records as the proposed regulation goes beyond the
statutory authority conferred on the agency. Cited
herein: K.S.A. 65-1627; 65-1630; 65-1637; 65-1642;
65-1643; 74-1603; K.A.R. 68-2-21 (proposed to take
effect May 1, 1986).

* * *

Dear Ms. Ebel:

As the attorney for the Board of Pharmacy for the State of
Kansas, you ask our opinion whether the Board has authority to
adopt a regulation requiring each pharmacy licensed in the
State of Kansas to establish and maintain patient profile
records.

You state that the Board of Pharmacy (Board) has adopted the
following permanent administrative regulation to become
effective May 1, 1986:

"68-2-21. Patient Profile Records.
Each pharmacy shall establish and maintain
a patient profile record for each patient

serviced by the pharmacy. The profile shall contain sufficient information to allow monitoring of patient drug therapy including therapeutic incompatibilities, drug interactions and potential allergic reactions. (Authorized by K.S.A. 65-1630; Implementing K.S.A. 1984 Supp. 65-1642; Effective May 1, 1986.)"

You also inform us that the Joint Committee on Rules and Regulations has reviewed K.A.R. 68-2-21 as proposed and is of the opinion that the Board does not have statutory authority to adopt the regulation.

A pharmacy must be registered before it may operate in the state. K.S.A. 65-1643. The Board of Pharmacy, established by K.S.A. 74-1603 et seq., has the authority to issue and the power to revoke or suspend a registration. K.S.A. 65-1627(c), 65-1643(a). Pursuant to K.S.A. 65-1630, the Board is authorized to "adopt and promulgate such reasonable rules and regulations, not inconsistent with law, as may be necessary to carry out the purposes and enforce the provisions of this act"

The power of an administrative agency to adopt rules and regulations is administrative in nature, not legislative, and to be valid a rule or regulation must be within the statutory authority confirmed upon the agency. Malone Oil Co. v. Department of Health & Environment, 234 Kan. 1066, 1068 (1984); Wesley Medical Center v. Clark, 234 Kan. 13, Syl. ¶5 (1983).

"An administrative rule and regulation which goes beyond that which the legislature has authorized, or which violates the statute, or which alters, extends, or limits the source of its legislative powers, is void." Woods v. Midwest Conveyor Co., 231 Kan. 763, Syl. ¶3 (1982).

See Lindstrom v. St. Francis Hosp. & Med. Center, Inc., 6 Kan. App.2d 948, 951 (1981) rev. denied 230 Kan. 818 (1982). In Pork Motel, Corp. v. Kansas Dept of Health & Environment, 234 Kan. 374, 378-79 (1983), the Kansas Supreme Court stated:

"Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes, therefore any exercise of authority claimed by the agency must come from within the statutes. There is no general or common law power that can be exercised by an administrative agency.

". . . Those rules or regulations that go beyond the authority authorized, which violate the statute, or are inconsistent with the statutory powers of the agency have been found void. Administrative rules and regulations to be valid must be appropriate, reasonable and not inconsistent with the law."

See Tew v. Topeka Police & Fire Civ. Serv. Comm'n., 237 Kan. 96, 100 (1985); Halford v. City of Topeka, 234 Kan. 934, 939-40 (1984).

The question presented for our opinion is whether the statutory authority asserted by the Board of Pharmacy as the basis for K.A.R. 68-2-21 is broad enough to authorize the regulation. K.S.A. 65-1642, which is listed in the proposed regulation as the implementing statute, concerns pharmacy equipment and records. The statute provides that each pharmacy must be equipped with proper pharmaceutical utensils and that the Board shall prescribe the minimum requirements. In accordance with K.S.A. 65-1637(b), a pharmacist must record all prescription orders in writing. K.S.A. 65-1642 requires all prescription orders filled by the pharmacy to be kept for a certain number of years:

"There shall be kept in every pharmacy a suitable book or file, in which shall be preserved for a period of not less than three years, every prescription order filled at the pharmacy prior to the effective date of this act and for a period of not less than five years, every prescription order filled at the pharmacy on or after the effective date of this act, and the book or file of prescription orders shall at all times be open to inspection of the members of the board and the secretary of health and environment

and the duly authorized agents or employees of such board or secretary and other proper authorities."

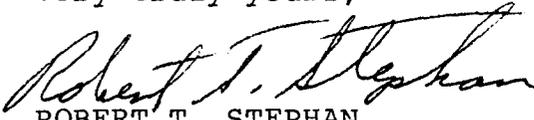
The Board is of the opinion that, even though there is no express statutory authority concerning patient profile records, the regulation is reasonable and is not inconsistent with any statute. The Board maintains the regulation was promulgated in the interest of the public and is not overly restrictive as the pharmacy has some discretion to determine what is sufficient information to allow monitoring of patient drug therapy.

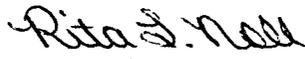
Even though K.A.R. 68-2-21 is not inconsistent with the pharmacy statutes, it appears that the regulation extends the source of its legislative powers. The proposed regulation provides that the "profile shall contain sufficient information to allow monitoring of patient drug therapy including therapeutic incompatibilities, drug interactions and potential allergic reactions." An argument could be made that, since a pharmacy must keep written records of prescription orders, the Board by virtue of its powers to adopt rules and regulations to carry out its duties has statutory authority to adopt a regulation requiring pharmacies to keep patient profile records.

The provisions in K.S.A. 65-1642 concerning equipment and records are quite different. The statute generally states that each pharmacy must be properly equipped and that the "board shall prescribe the minimum of such professional and technical equipment" The provisions concerning records, however, are more specific. K.S.A. 65-1642 does not require pharmacies to keep records in general, but specifically states that a pharmacy must keep a record of all prescription orders. The proposed regulation does not merely state how information required to be kept by a pharmacy shall be recorded, the regulation mandates a pharmacy to obtain more and different kinds of information not preserved in written prescription orders. Even though patient profile records would utilize the information contained in the written prescription orders, the regulation would require a pharmacy to solicit from its customers information other than the prescription filled at that pharmacy for that customer. While individual pharmacies may have some discretion as to the detail and format of the profile records of its customers, such a regulation would require pharmacies to create documents that go beyond the information specifically limited by statute that a pharmacy is required to keep.

The purpose and desirable goal of K.A.R. 68-2-21 cannot be questioned. It is our opinion, however, that the Board of Pharmacy does not have authority to promulgate a regulation mandating patient profile records as the proposed regulation goes beyond the statutory authority conferred on the agency.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


Rita L. Noll
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