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GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 79-1123
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of	:	<u>February 20, 1980</u>
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GEORGE DEUKMEJIAN	:	
Attorney General	:	
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Rodney Lilyquist, Jr.	:	
Deputy Attorney General	:	
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SUBJECT: EXPANSION OF SCOPE OF PRACTICE; CHANGE OF ADMINISTRATIVE REGULATIONS—The Department of Health Services may not expand the scope of practice of non-physician health practitioners in general acute care hospitals. Administrative regulations may be substantially changed during the adoption process after public hearings have been held and prior to issuance, as long as they relate directly to the same subject or issue.

The Honorable Bill Lancaster, Assemblyman for the 62nd District, has requested an opinion on the following questions:

1. May the Department of Health Services expand the scope of practice of non-physician health practitioners in general acute care hospitals?
2. May administrative regulations be substantially changed during the adoption process after public hearings have been held and prior to issuance?

CONCLUSIONS

1. The Department of Health Services may not expand the scope of practice of non-physician health practitioners in general acute care hospitals.

2. Administrative regulations may be substantially changed during the adoption process after public hearings have been held and prior to issuance, as long as they relate directly to the same subject or issue.

ANALYSIS

We are informed that the Department of Health Services (“Department”) is considering whether to adopt certain regulations dealing with the scope of practice of dentists, podiatrists, nurse-midwives, registered nurses, and physician assistants in general acute care hospitals.

The questions presented for analysis concern the authority of the Department to regulate the scope of practice of such non-physician health practitioners and whether the regulations may be substantially changed during the adoption process without holding additional public hearings. We conclude (1) that the Department may not expand the scope of practice of these practitioners and (2) that proposed regulations may be substantially changed prior to issuance if certain conditions are met.

A. Scope of Practice

In the licensing provisions of the Business and Professions Code,¹ the Legislature has defined the scope of practice of dentists (§ 1625), podiatrists (§ 2525.13), registered nurses (§ 2725), nurse-midwives (§ 2746.5), and physician assistants (§ 3502). Each profession has its own statutory scheme concerning qualifications and licensing requirements and is under the administration of a board within the Department of Consumer Affairs (“DCA”).

For example, the Dental Practice Act is administered by the Board of Dental Examiners of California within the DCA (§§ 1600–1601). The Legislature has given the board authority to issue regulations concerning the scope of practice of dentists as long as they are reasonably necessary and not inconsistent with the statutory limitations. (§ 1614, subd. (f).)

¹ All unidentified section references hereinafter are to the Business and Professions Code.

Similarly, the practice of podiatry is subject to regulation by the Division of Allied Health Professions of the Board of Medical Quality Assurance of the DCA (§§ 2100.2, 2100.5, 2100.8, 2119, 2525.25), the scope of practice of nurse-midwives and of registered nurses is regulated by the Board of Registered Nursing of the DCA (§§ 2701, 2715), and the scope of practice for physician's assistants is under the administration of the Division of Allied Health Professions and its Physician's Assistant Examining Committee. (§§ 3501, 3509, 3510.)

It is apparent, therefore, that the Legislature has given to the various boards of the DCA the responsibility for regulating the scope of practice of the non-physician health practitioners under consideration here, requiring only that the regulations be reasonably necessary and not inconsistent with the statutory limitations imposed by the Legislature.

The Department, on the other hand, has been given authority to inspect and license the operations of health facilities, including general acute care hospitals. (Health & Saf. Code, §§ 1250, 1254.) Specifically, the Department's "regulations shall prescribe standards of adequacy, safety, and sanitation of the physical plant of staffing with duly qualified licensed personnel, and of services, based on the type of health facility and the needs of the persons served thereby." Thus, the Department's regulations cover "the premises, the management, the bylaws, rules and regulations, the equipment, the staffing, both professional and unprofessional, and the standards of care and services." (Health & Saf. Code, § 1277, subd. (a).) "Services" for general acute care hospitals are "basic" (medical, nursing, surgical, anesthesia, laboratory, radiology, pharmacy, and dietary) and "special" (radiation therapy, burn, emergency, hemodialysis, psychiatric, intensive-care newborn, cardiac surgery, renal transplant, and other special services prescribed by the Department). (Health & Saf. Code, §§ 1250 subd. (a), 1255.)

In interpreting these statutes, we are guided by the well established principle that statutes dealing with the same subject matter are to be construed together and harmonized by considering the statutory framework as a whole. (*California Mfgs. Assn. v. Public Utilities Com.* (1979) 24 Cal. 3d 836, 844; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal. 3d 222, 230.)

Given that the Legislature has defined the scope of practice of non-physician health practitioners in the Business and Professions Code and has provided for the regulation thereof by various boards within the DCA, we view the Department's responsibilities as excluding the regulation of an individual practitioner's scope of practice. Rather, the Department's duties would include insuring that a particular health facility has adequate equipment and licensed personnel, and is providing the specified services of its license in a satisfactory manner. While the DCA may restrict the performance of certain "services" in general acute care hospitals that would otherwise be within the scope of practice of these

practitioners, we can find no provision in the Health and Safety Code which would suggest that the Department may enlarge the scope of practice of these practitioners through its licensing of health facilities.

We have reviewed the proposed regulations of the Department and they appear to be consistent with the above analysis. They would allow non-physician health practitioners to perform in general acute care hospitals within the scope of their respective practice as defined by the Legislature and regulated by the boards of the DCA. In other words, the proposals allow the performance of certain acts in general acute care hospitals by all persons otherwise authorized to perform those acts. As such, the proposed regulations would conform to the following pronouncements by the Supreme Court: “no regulation is valid if its issuance exceeds the scope of the enabling statute” (*Wildlife Alive v. Chickering* (1976) 18 Cal. 3d 190, 205), and “An administrative officer may not make a rule or regulation that alters or enlarges the terms of a legislative enactment.” (*Whitcomb Hotel, Inc. v. Cal. Emps. Com.* (1944) 24 Cal. 2d 753, 757; see also *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal. 3d 392, 419–420; *Cooper v. Swoap* (1974) 11 Cal. 3d 856, 864.)

The conclusion to ‘the first question, therefore, is that the Department may not expand the scope of practice of non-physician health practitioners in general acute care hospitals.

B. Changes in Proposed Regulations

Pursuant to Government Code section 11423, an administrative agency must provide notice of any proposed action to adopt, amend or repeal one of its regulations. The notice must include “reference to the particular code sections or other provisions of law which are being implemented, interpreted, or made specific” and “the express terms of, or an informative digest containing a concise and clear summary of existing laws and regulations, if any, related directly to the proposed action and the effect of the proposed action.” (Gov. Code, § 11424, subds. (b), (c).) Interested parties must be given an opportunity to present statements and arguments concerning the proposed action, and the agency “shall consider all relevant matter presented to it before adopting, amending or repealing any regulation.” (Gov. Code, § 11425.)

The purposes of these statutes include “assurance of meaningful public participation in the adoption of administrative regulations by state agencies” and “creation of an administrative record assuring effective judicial review.” (*California Optometric Assn. v. Lackner* (1976) 60 Cal. 3d 500, 506; see also *California Assn. of Nursing Homes etc., Inc. v. Williams* (1970) 4 Cal. App. 3d 800, 810–812.)

The question of whether administrative regulations may be substantially changed during the adoption process was carefully considered in *Schenley Affiliated Brands Corp. v. Kirby* (1971) 21 Cal. App. 3d 177, 193:

“The hearing is designed to measure the draft proposal’s advantages and disadvantages; to supply a forum for objections and expressions of full or partial agreement; to permit counterproposals. Regulatory agencies frequently find difficulty in predicting the practical impact of regulatory proposals. The hearing not only assures public participation; it also provides the agency with an improved set of predictions. A prime objective is to persuade the agency into action differing from its pre-hearing proposal. If the persuasion is successful, the adopted regulation will necessarily diverge from that described in the pre-hearing notice.

“Thus, eventual adoption of a regulation differing from that described in the pre-hearing notice is one objective of the hearing process. Fairness too is a statutory desideratum. After an opportunity for participation in a hearing considering the subject or issue evoked by the prehearing draft or summary, affected interests cannot claim unfairness when the agency’s consideration of new information and views persuades it into a different enactment dealing with the identical subject or issue. To confine the agency to the terms of its pre-hearing proposal would negate a basic purpose of the hearing. To require a new notice and hearing would tie the agency into time-consuming, circular proceedings transcending the statutory objective.

“Section 11424 is not offended if the adoption procedure culminates in a regulation differing substantially from that described in the published notice but devoted to the same subject or issue.”

In *California Optometric Assn. v. Lachner*, *supra*. 60 Cal. App. 3d 500, 508, the Court of Appeal restated the *Schenley* rule:

“... Possible adoption of a regulation differing from the original proposal is one objective of the hearing process; to confine the agency to the terms of its original proposal would negate that objective. (*Schenley Affiliated Brands Corp. v. Kirby*, *supra*, 21 Cal. App. 3d at p. 193.) To restrict the agency to evidence produced at the time and place specified in the public notice would generate undesirable inflexibility. Decisions interpreting parallel statutes have discerned no subversion of statutory purpose, no fundamental unfairness when the agency considers information received after the hearing. (*Ray v. Parker*, *supra*, 15 Cal. 2d at Pp. 303–304; *California Grape etc.*,

League v. industrial Welfare Com. (1969) 268 Cal. App. 2d 692, 708–610 [74 Cal. Rptr. 3131; *Rivera v. Industrial Welfare Com.*, *supra*, 265 Cal. App. 2d at pp. 589–590; *Emby Foods, Inc. v. Paul*, *supra*, 230 Cal. App. 2d at p. 695.) Neither expressly nor impliedly does section 11425 prohibit consideration of ‘post-hearing’ information.”

In 1978, the Legislature codified the “same subject or issue” rule by adding the following language to Government Code section 11425:

“The state agency shall make no substantial change or modification to a proposed adoption, amendment, or repeal of a regulation unless such change or modification is related directly to the same subject or issue noticed pursuant to Section 11424”

Accordingly, we conclude that administrative regulations may be substantially changed during the adoption process after public hearings have been held and prior to issuance, as long as they relate directly to the same subject or issue.
