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OPINION	:	No. 81-112
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of	:	<u>APRIL 15, 1981</u>
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The Honorable Paul B. Carpenter, Senator, Thirty-Seventh District, has requested an opinion on the following question:

Does section 1277, subdivision (b) of the Health and Safety Code, when read in conjunction with the licensing regulations governing health facilities, prevent the transfer of an unlicensed psychologist or clinical social worker from one state hospital to another, or from a non-hospital program to a state hospital?<sup>1</sup>

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<sup>1</sup> This opinion constitutes a reconsideration by us of Opinion No. 80–503 where we considered the same question as originally presented by the Honorable David E. Loberg, Ph.D, Director, Department of Developmental Services, and wherein we reached a somewhat different conclusion based upon an analysis solely of licensing regulations applicable to health facilities licensed by the state. That opinion, found in the advance sheets of our published opinions in 63 Ops. Cal. Atty. Gen. 723 (1980), will not appear in the permanent reports and is superseded by this opinion.

## CONCLUSION

Section 1277, subdivision (b) of the Health and Safety Code, when read in conjunction with the licensing regulations governing health facilities, does prevent the transfer of unlicensed psychologists or clinical social workers from one state hospital to another, or from a non-hospital program to a state hospital. Except as expressly provided therein, section 1277, subdivision (b) eliminated the “governmental exemption” from professional licensure as to those disciplines for persons employed in governmental health facilities licensed by the state.

## ANALYSIS

Prior to January 1, 1979 psychologists and social workers working in state hospitals were exempt from the professional licensure requirements contained in the Business and Professions Code for their respective disciplines.<sup>2</sup> Accordingly, whatever professional licenses they were required to have were found in the regulations of the Department of Health Services with respect to the licensing requirements for health facilities. “Health facilities” are licensed pursuant to section 1250 *et seq.* of the Health and Safety Code.<sup>3</sup> These facilities included (1) general acute care hospitals, (2) acute psychiatric hospitals, (3) skilled nursing facilities, (4) intermediate care facilities, (5) special hospitals, and (6) general acute care/rehabilitation hospitals.<sup>4</sup> The Department of Health Services is authorized to adopt regulations which shall prescribe standards “. . . of staffing with duly qualified licensed personnel . . . based on the type of health facility and the needs of persons served thereby.” (§ 1276; see also § 1275.1 with regard to psychiatric health facilities.)

In reality, the regulations governing the licensing of health facilities were adopted by predecessor departments such as the Department of Public Health, the Department of Mental Hygiene or the Department of Health, and carried forward by

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<sup>2</sup> Thus, as to psychologists section 2909 of the Business and Professions Code exempted persons employed by federal, state, county or municipal organizations,’ and a similar blanket exemption was contained in section 2910 for salaried employees of “governmental agencies.”

As to clinical social workers, section 9053, subdivision (e) provided an exemption for [i]ndividuals employed in federal, state, county or municipal organizations. This language is still contained in the Business and Professions Code. As will be developed herein, it must be considered to have been modified by the provisions of section 1277, subdivision (b) of the Health and Safety Code.

<sup>3</sup> Future unidentified code section references will be to the Health and Safety Code.

<sup>4</sup> We note the minor change in nomenclature and definitions as to “health facilities provided by the amendment to section 1250 by Stats. 1980, chapter 569, sec. 1.

explicit sanction of law. (See §§ 1275, 1275.5.) These regulations are found in title 22 of the California Administrative Code. An examination of these regulations discloses that psychologists must possess a professional license to serve in a general acute care facility, an acute psychiatric facility, a skilled nursing facility, an intermediate care facility, but need not possess such a license in an intermediate care facility/developmentally disabled.<sup>5</sup> As to social workers, a similar examination of the regulations discloses that such personnel must be licensed as clinical social workers in general acute care facilities and acute psychiatric facilities, but need not be so licensed in skilled nursing facilities, intermediate care facilities or intermediate care facilities/developmentally disabled.<sup>6</sup>

No distinction, however, is made between the licensure requirements in governmental health facilities and those in private health facilities in the title 22 regulations.

With this background regarding the licensing of health facilities by the Department of Health Services, we now proceed to the provision to be construed herein, that is, section 1277, subdivision (b), to determine if it prevents the transfer of unlicensed personnel between state health facilities, or from non-hospital programs to such facilities.

Chapter 321, Statutes of 1978, contained the first amendment material to our consideration herein. It enacted a new subdivision (b) to section 1277, which provided:

“(b) Notwithstanding any provision of Division 7 (commencing with Section 7000) of the Welfare and Institutions Code or any other law to the contrary, the licensure requirements for professional personnel in state and other governmental health facilities licensed by the state department shall not be less than for professional personnel in health facilities under private ownership. Such personnel who have been continuously employed on January 1, 1979, in the same state or other governmental health facilities licensed by the state department, including those persons on authorized leave, shall be exempt from the requirements of this subdivision. The requirements of this subdivision may be waived by the state department for new graduates and recruits from outside of this state for a period not to exceed two years from the date of their employment, on which date they shall have proper licenses or be terminated.”

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<sup>5</sup> See Cal. Admin. Code, tit 22, §§ 70055, subd. (a)(29), 71053, subd. (15), 72087, 73089 and 76131 respectively.

<sup>6</sup> See Cal. Admin. Code, tit 22, §§ 70055, subd. (a)(37), 71053 subd. (20), 72101, 73103 and 76146.

In 1978, neither chapter 321 nor any other law amended the provisions of the Business and Professions Code with respect to the licensing of psychologists or clinical social workers. The blanket exemptions for government employees provided in those codes were left untouched. (See note 2, *supra*.) Accordingly, when the Legislature referred to “the licensure requirements for professional personnel in state and other governmental health facilities licensed by the state department [of Health Services]” it did not make clear by its language whether it was referring to the licensing requirements for personnel which are imposed by the Department of Health Services under title 22 of the California Administrative Code for hospitals, or to the professional licensing requirements found in the Business and Professions Code for individuals. If it meant the latter, then chapter 321 also constituted an implied amendment to the “blanket exemptions” for governmental professionals found in that code such as were applicable to psychologists and clinical social workers.

That it meant the latter, however, is evident from the next development with respect to section 1277, subdivision (b). During 1979 the Legislature enacted Senate Bill 230. (Stats. 1979, chapter 996.) As pertinent to our inquiry, subdivision (b) was amended to provide:

“(b) Notwithstanding any provision of Part 2 (commencing with Section 5600) of Division 5 of, or Division 7 (commencing with Section 7000) of, the Welfare and Institutions Code or any other law to the contrary, except Sections 2137.1 and 2137.2 of the Business and Professions Code, the licensure requirements for professional personnel, including, but not limited to, physicians and surgeons, dentists, podiatrists, psychologists, pharmacists, registered nurses, and clinical social workers in the state and other governmental health facilities licensed by the state department shall not be less than for such professional personnel in health facilities under private ownership.

Persons employed as psychologists and clinical social workers, while, continuing in their employment in the same class as of January 1, 1979, in the same state or other health facility licensed by the state department, including those persons on authorized leave, but not including intermittent personnel, shall be exempt from the requirements of this subdivision. Additionally, the requirements of this subdivision may be waived by the state department solely for persons in the professions of psychology or clinical social work who are gaining qualifying experience for licensure in such profession in this state. A waiver granted pursuant to this subdivision shall not exceed two years from the date the employment commences in this state in the case of psychologists, or three years from commencement of the

employment in this state in the case of clinical social workers, at which time licensure shall have been obtained or the employment shall be terminated. However, this durational limitation upon waivers shall not apply to active candidates for a doctoral degree in social work, social welfare, or social science, who are enrolled at an accredited university, college or professional school, but such limitations shall apply following completion of such training. A waiver pursuant to this subdivision shall be granted only to the extent necessary to qualify for licensure, except that personnel recruited for employment from outside this state and whose experience is sufficient to gain admission to a licensing examination shall nevertheless have one year from the date of their employment in California to become licensed, at which time licensure shall have been obtained or the employment shall be terminated, provided that the employee shall take the licensure examination at the earliest possible date after the date of his or her employment, and if the employee does not pass the examination at that time, he or she shall have a second opportunity to pass the examination, subject to the one-year limit.”<sup>7</sup>

It is thus seen that although section 1277, subdivision (b), as amended in 1978, spoke in terms of licensure of “professional personnel” in governmental facilities, and as amended in 1979, contained an enumeration of such “professional personnel,” its intended impact was to be upon psychologists and clinical social workers.<sup>8</sup>

That this is so is also seen from the additional provisions of chapter 996, Statutes of 1979. More importantly, however, it is also evident from these additional provisions that the Legislature, in enacting section 1277(b), intended to modify the licensure requirements found *both* in the Business and Professions Code and in title 22 of

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<sup>7</sup> The only amendment to section 1277, subdivision (b) since then has been the amendment of the figures “7000” to read “7100” in the second parenthesis. (Stats. 1980, cli. 676, sec. 154.)

The main purpose of the 1979 amendment is set forth in section 1 of chapter 996, Statutes of 1979:

SECTION 1. Chapter 321 of the Statutes of 1978 established an unintentional two-year waiver of the licensure requirements for professional personnel, other than psychologists and clinical social workers, by its amendment of subdivision (b) Section 1277 of the Health and Safety Code. It is the intent of the legislature in enacting this act to restrict the exemption specified in such provisions to the minimum time required for personnel in the professions of psychology and clinical social work, to ensure the application of such provisions equally as to all facilities and services of the State Department of Mental Health and the State Department of Developmental Services.

<sup>8</sup> We are not aware that the state has permitted unlicensed physicians, dentists, podiatrists, etc. to work in governmental health facilities.

the California Administrative Code with respect to psychologists and clinical social workers in governmental health facilities.

Thus, section 5600.2 was added to the provisions of the Short Doyle Act (Welf. & Inst. Code, § 5600 *et seq.*) to provide:

“(a) Except as provided in subdivision (b), persons employed or under contract to provide mental health services pursuant to this part shall be subject to all applicable requirements of law respecting professional licensure, and no person shall be employed in local mental health programs pursuant to this part to provide services for which such license is required, unless such person possesses a currently valid license . . . .” (Emphasis added.)

Subdivision (b) of section 5600.2 then provides a “grandfather clause” and exemptions similar to those found in section 1277, subdivision (b) for psychologists and clinical social workers. With respect to the “grandfather clause,” such is applicable “while continuing in their employment . . . in the same program or facility” (emphasis added). The use of the term “program” as well as “facility” is a strong indication that the Legislature intended by chapter 996 not only to affect or modify the provisions of title 22 of the California Administrative Code where licensure was not required of psychologists or clinical social workers in certain health facilities, but to modify the licensure requirements (i.e. the exemptions) found in the Business and Professions Code as well.

Additionally, sections 2909 and 2910 of the Business and Professions Code were amended to modify the “blanket exemption” for governmental psychologists. (See note 2, *supra*.) Section 2909 was amended to *restrict* the exemption to psychologists employed by “governmental organizations which are not primarily involved in the provisions of direct health or mental health services.” Section 2910 was amended to require for exemption from licensure for government psychologists that “[s]uch persons do not provide direct health or mental health services.” Again, we see a desire on the part of the Legislature to reach beyond mere licensure requirements for governmental *facilities*, indicating a general intent both in 1978 and 1979 to modify *both* the title 22 provisions and the Business and Professions Code.<sup>9</sup>

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<sup>9</sup> At this time and to the present the “blanket exemption” found in the Business and Professions Code with respect to the licensure of clinical social workers who work for governmental agencies has not been modified.

This is explainable as follows: In 1978 (chapter 321) the Legislature intended to impliedly amend the “blanket exemption” with respect to both psychologists and clinical social workers who actually work in and practice their profession in *governmental health facilities*. In 1979 the

From the foregoing analysis of chapter 996, Statutes of 1979 (S.B. 230) it is evident that the Legislature, in amending section 1277 to provide a new subdivision (b) in 1978, and in further amending it in 1979, intended not only to refer to the licensure requirements already found in title 22 of the California Administrative Code, but intended to modify both them and the Business and Professions Code exemptions with respect to *both* psychologists and clinical social workers who practice that profession in governmental health facilities. In essence, the purpose of section 1277, subdivision (b), and other complementary legislation was to upgrade the professional qualifications of professional personnel in governmental health facilities and programs, and to require that such personnel have the same professional licenses as if they were practicing in parallel private capacities.

With this in mind, we now return to the precise question asked, that is, whether section 1277, subdivision (b), when read in conjunction with the licensing regulations governing health facilities, prevents the transfer of an unlicensed psychologist or clinical social worker from one state hospital to another, or from a non-hospital program to a state hospital. We conclude that section 1277, subdivision (b) prevents such transfer. The “grandfather clause” would constitute the only “escape hatch.” However, *it is clear and unambiguous*. It exempts from professional licensure requirements only persons while employed in the “same class” as of January 1, 1979, in the *same* state or other governmental health facility. (Emphases added.) As stated by the court in *People v. Belleci* (1979) 24 Cal. 3d 879, 884:

“It is settled that “‘We are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them.’ [Citations.]” (*Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal. 3d 650, 658 [147 Cal. Rptr. 359, 580 P.2d 11551].) Stated otherwise, ‘When statutory language is thus clear and unambiguous there is no need for construction, and courts should not indulge in it.’ (*Solberg v. Superior Court* (1977) 19 Cal. 3d 182, 198 [137 Cal. Rptr. 460, 561 P.2d 1148]; accord, *People v. Boyd* (1979) 24 Cal. 3d 285, 294 [155 Cal.Rptr. 367, 594 P.2d 484]; *Great Lakes Properties, Inc. v. City of El Segundo* (1977) 19 Cal. 3d 152, 155 [137 Cal. Rptr. 154, 561 P.2d 244].)

“We have declined to follow the plain meaning of a statute only when it would inevitably have frustrated the manifest purposes of the legislation as

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Legislature desired to *further* restrict the exemption only as to psychologists and require that *all* governmental psychologists who provide direct “mental health service,” whether in or outside of a governmental health facility, must possess a professional license. To accomplish this result, the Legislature need only have amended the Psychology Licensing Law.

a whole or led to absurd results. (See, e.g., *Younger v. Superior Court* (MACK) (1978) 21 Cal. 3d 102, 113–114 [145 Cal. Rptr. 674, 577 P.2d 1014]; *Silver v. Brown* (1966) 63 Cal. 2d 841, 845 [48 Cal. Rptr. 609, 409 P.2d 689].) . . .”

Clearly, the “grandfather clause” would not be applicable to psychologists or social workers in another health facility, or in non-hospital programs.

Nor would either of the exceptions to the “plain meaning rule” of statutory construction set forth above by the court be applicable to the “grandfather clause.” A “strict interpretation” thereof in accordance with its plain meaning is in furtherance of and not contrary to the manifest intention of the Legislature to upgrade the professional qualifications of personnel in governmental health facilities and programs. Nor do we deem it absurd for the Legislature not to have enlarged the scope of the “grandfather clause” to encompass all governmentally employed psychologists or clinical social workers. The Legislature clearly could have required all governmental psychologists and clinical social workers to be licensed immediately without any “grandfathering.” Thus, the “grandfather clause” as found in section 1277, subdivision (b) is a matter of legislative grace. Furthermore, the “grandfather clause” constitutes an exception to the general operative features of section 1277, subdivision (b) that the enumerated personnel be licensed. As the California Supreme Court noted with respect to a “grandfather clause” in *People ex rel. S.F. Bay etc. Com. v. Town of Emeryville* (1968) 69 Cal. 2d 533, 543:

“It is a wise and well-settled principle of statutory construction that ‘where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms, In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof.’ . . .”

It has been suggested, however, that the inability of the Department of Developmental Services to transfer unlicensed psychologists or clinical social workers freely throughout the department will interfere with, and conflict with normal civil service procedures with respect to transfer, promotion and placement in the event of layoff. (See, generally, Gov. Code §§ 18950–18954; 19360–19370; 19530–19556.) The most we can say with respect to this suggestion is that the Legislature has spoken and has set forth the professional licensing requirements for governmentally employed psychologists and clinical social workers (and others) by its adoption of section 1277, subdivision (b). Accordingly, insofar as section 1277, subdivision (b) cannot be harmonized with the general provisions of the state civil service laws, section 1277, subdivision (b) must



control. As stated in *People v. Tanner* (1979) 24 Cal. 3d 514, 521:

“ . . . A specific provision relating to a particular subject will govern a general provision, even though the general provision standing alone would be broad enough to include the subject to which the specific provision relates. . . .”

Furthermore, although repeals by implications are not favored, the courts still recognize the rule that a later enactment will prevail over an earlier one “when there is no rational basis for harmonizing” them. (See, generally, *Fuentes v. Workers’ Comp. Appeals Bd.* (1976) 16 Cal. 3d 1, 6–7.)

In summary we conclude that section 1277, subdivision (b), when read in conjunction with the licensing regulations governing health facilities found in title 22 of the California Administrative Code, and in conjunction with other amendments to our law set forth by chapter 996, Statutes of 1979 (S.B. 230), prevents the transfer of unlicensed psychologists or clinical social workers from one state hospital to another, or from a non-hospital program to a state hospital. This conclusion, of course, assumes that the personnel would be transferred to perform duties which constitute the practice of those professions as delineated in the respective licensing laws found in the Business and Professions Code.

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