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March 5, 2018

ATTORNEY GENERAL OPINION NO. 2018- 8

Tucker L. Poling
General Counsel
Kansas State Board of Healing Arts
800 SW Jackson, Lower Level Suite A
Topeka, KS 66612

Re: Public Health—Naturopathic Doctors—Administration of Act by State Board of Healing Arts

Synopsis: The Kansas State Board of Healing Arts has the legal authority to decide whether a particular activity is within the scope of naturopathy as defined by K.S.A. 2017 Supp. 65-7202(b) so long as such decision is consistent with state law and is not unreasonable, arbitrary, or capricious. Cited herein: K.S.A. 2017 Supp. 65-2802; 65-2836; 65-2864; 65-7201; K.S.A. 2017 Supp. 65-7202; 65-7203; 65-7204; 65-7208; 65-7211; K.A.R. 100-72-3.

* * *

Dear Mr. Poling:

On behalf of the Kansas State Board of Healing Arts (Board), you ask our opinion on whether the Naturopathic Doctor Licensure Act (Act)¹ authorizes the Board to determine whether the ordering of diagnostic imaging, such as x-rays, is within the scope of “naturopathy” as defined by K.S.A. 2017 Supp. 65-7202(b). For the reasons described below, we believe the answer to your question is yes, subject to certain restrictions as further described below.

¹ K.S.A. 65-7201 *et seq.*

K.S.A. 2017 Supp. 65-7202(b) defines naturopathy as follows:

[A] system of health care practiced by naturopathic doctors for the prevention, diagnosis and treatment of human health conditions, injuries and diseases, that uses education, natural medicines and therapies to support and stimulate the individual's intrinsic self-healing processes, and includes prescribing, recommending or administering: (1) Food, food extracts, vitamins, minerals, enzymes, whole gland thyroid, botanicals, homeopathic preparations, nonprescription drugs, plant substances that are not designated as prescription drugs or controlled substances, topical drugs as defined in subsection (i) of this section, and amendments thereto; (2) health care counseling, nutritional counseling and dietary therapy, naturopathic physical applications, barrier contraceptive devices; (3) substances on the naturopathic formulary which are authorized for intramuscular or intravenous administration pursuant to a written protocol entered into with a physician who has entered into a written protocol with a naturopathic doctor licensed under this act; (4) noninvasive physical examinations, venipuncture to obtain blood for clinical laboratory tests and orofacial examinations, excluding endoscopies; (5) minor office procedures; and (6) naturopathic acupuncture. A naturopathic doctor may not perform surgery, obstetrics, administer ionizing radiation, or prescribe, dispense or administer any controlled substances as defined in K.S.A. 65-4101, and amendments thereto, or any prescription-only drugs except those listed on the naturopathic formulary adopted by the board pursuant to this act.

K.S.A. 2017 Supp. 65-7211(c) provides the following limitation of the scope of practice of a licensed naturopathic doctor: “[n]o statute granting authority to persons licensed or registered by the state board of healing arts shall be construed to confer authority upon naturopathic doctors to engage in any activity not conferred by this act.”

In other words, the scope of a licensed naturopathic doctor’s practice is limited to those activities the Act authorizes those licensees to perform. The fact that a naturopathic doctor is licensed by the Board does not entitle the naturopathic doctor to perform the same services as other Board licensees, such as physicians and physician assistants.

You ask if we believe the Board has the legal authority to determine whether the ordering of diagnostic imaging is within the scope of naturopathy as defined in K.S.A. 2017 Supp. 65-7202(b). You also state that presently the Board is not seeking to take any specific action to formalize its opinion of the scope of naturopathy, such as by adopting a regulation or disciplining a licensee, so our analysis concerns the general authority of state licensing agencies and the specific powers granted to the Board.

The Kansas Supreme Court has characterized the powers of a state administrative agency as follows: “[a]dministrative 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.”²

Put more specifically, “[a]ny authority claimed by an agency or board must be conferred in the authorizing statutes either expressly or by clear implication from the express powers granted.”³

In this case, the Act expressly authorizes the Board to perform certain functions, including: issue doctor of naturopathy licenses to applicants who meet the statutory qualifications for licensure;⁴ “adopt rules and regulations as may be necessary to administer the provisions of [the Act];”⁵ and discipline a licensed naturopathic doctor for unprofessional conduct, which includes being guilty of unprofessional conduct as defined by the Board’s rules and regulations,⁶ violating any rule or regulation of the Board,⁷ or violating any provision of the Act.⁸ The Act also states that the Board “shall administer the provisions of this act.”⁹

Thus, the Act empowers the Board to administer the Act, and to adopt rules and regulations defining unprofessional conduct for the purpose of professional discipline. The Act also clarifies that a naturopathic doctor license authorizes the licensee to perform only those activities as are authorized under the Act.

The Board has adopted a regulation defining “unprofessional conduct.” K.A.R. 100-72-3 states in relevant part:

“Unprofessional conduct” means the commission of any of the following by an applicant or a registrant:¹⁰

- (a) Unlawfully invading any branch of the healing arts by providing professional services that exceed the statutory definition of naturopathy, unless the professional services are provided under the supervision of or by order of a person who is licensed to practice the healing arts. . . .

Regulations adopted by the Board have the force and effect of law and are presumed valid.¹¹ “To be valid, rules or regulations of an administrative agency must be within the

² *Pork Motel, Corp. v. Kansas Dept. of Health and Environment*, 234 Kan. 374, 378-79 (1983).

³ *Fort Hays State University v. Fort Hays State University Chapter, American Assoc. of University Professors*, 290 Kan. 446, 455 (2010).

⁴ See K.S.A. 2017 Supp. 65-7204.

⁵ K.S.A. 2017 Supp. 65-7203(b).

⁶ K.S.A. 2017 Supp. 65-7208(a)(2).

⁷ K.S.A. 2017 Supp. 65-7208(a)(3).

⁸ K.S.A. 2017 Supp. 65-7208(a)(5).

⁹ K.S.A. 2017 Supp. 65-7203(a).

¹⁰ The Act originally established a system of *registration* of naturopathic doctors, but in 2010 the Act was amended to replace registration with licensure. See L. 2010, Ch. 126. K.A.R. 100-72-3 has not been amended since 2003; therefore, it appears that “registrant” is legacy language that should be construed to refer to a licensed naturopathic doctor.

statutory authority conferred upon the agency and must be appropriate, reasonable, and not inconsistent with the law.”¹²

In our opinion, K.A.R. 100-72-3(a), as quoted above, is within the statutory authority of the Board to adopt and enforce, and is an appropriate and reasonable definition of “unprofessional conduct.” It is also consistent with K.S.A. 2017 Supp. 65-7211(c) in that it prohibits a licensed naturopathic doctor from performing activities beyond those authorized by the Act.

As part of the Board’s determination of whether K.A.R. 100-72-3(a) has been violated, the Board must necessarily determine whether a licensed naturopathic doctor has performed services that “exceed the statutory definition of naturopathy.” Therefore, we believe the Board has the legal authority to determine that a particular practice is outside the scope of practice of naturopathy.

This authority is not unlimited, however. When interpreting a statute or regulation Kansas courts owe no deference to an administrative agency’s interpretation or construction of the statute or regulation.¹³ State agency action is also subject to the Kansas Judicial Review Act,¹⁴ which authorizes the court to grant relief if the state agency action is unreasonable, arbitrary or capricious.¹⁵

Whether the ordering of a particular diagnostic imaging procedure falls within the scope of naturopathy may involve a question of fact. For example, K.S.A. 2017 Supp. 65-7202(b) defines naturopathy to include “prescribing, recommending or administering . . . noninvasive physical examinations. . . .” We note that the Board has not adopted a regulation to define “noninvasive physical examination.”

We note that in your letter, you suggest that the Board’s general oversight powers described in K.S.A. 2017 Supp. 65-2836(g) and 65-2864 support a finding that the Board has the power to determine whether particular practices fall within the scope of naturopathy. However, those statutes do not apply to the Act because their application is limited to persons “licensed under [the Kansas Health Arts Act, K.S.A. 65-2801 *et seq.*] to practice medicine and surgery, osteopathic medicine and surgery or chiropractic.”¹⁶ Therefore, those statutes are not useful in determining the Board’s authority to interpret the Act.

In conclusion, it is our opinion that the Board is legally authorized to determine whether a particular activity falls within the scope of practice of naturopathy as defined by K.S.A.

¹¹ See, e.g., *In re City of Wichita*, 277 Kan. 487 (2004).

¹² *Id.* at 495.

¹³ *Villa v. Kansas Health Policy Authority*, 296 Kan. 315 (2013) (“ . . . an agency’s interpretation of a statute or regulation is not afforded any significant deference on judicial review.”).

¹⁴ K.S.A. 77-601 *et seq.*

¹⁵ K.S.A. 2017 Supp. 77-621(c)(8).

¹⁶ See K.S.A. 2017 Supp. 65-2802(d) (defining “licensee” for the purposes of the Kansas Healing Arts Act); 65-2836(g) and 65-2864. We would also caution the Board to be mindful of potential antitrust challenges. See *North Carolina State Bd. Of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101 (2015).

2017 Supp. 65-7202(b), so long as the Board's action is consistent with state law and is not unreasonable, arbitrary or capricious.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Attorney General

/s/Sarah Fertig

Sarah Fertig
Assistant Attorney General

DS:AA:SF:sb