Department of Veterans Affairs

Memorandum

Date: May 23, 2011 **VAOPGCADV 7-2011**

From: General Counsel (023)

Subj: Federal Supremacy and Nursing Scope of Practice (GCL 35003)

To: Principal Deputy Under Secretary for Health (10A/108)

QUESTIONS PRESENTED:

You have asked us whether VA legally may develop a national nursing scope of practice that would allow VA to standardize the professional practice of its nurses across the nation, regardless of individual State Practice Acts or the location of the medical facility. Under such a national scope of practice, you propose to authorize all Advanced Practice Registered Nurses (APRNs) to practice independently, regardless of the authority granted by their State licenses. The national scope also would authorize registered nurses (RNs) to make certain independent medical care decisions pursuant to protocols. Currently, not all States approve nursing protocols or license their APRNs to practice independently. Implicit in your request is the concern that VA nurses could jeopardize their licenses if they comply with VA requirements that are inconsistent with their State Practice Acts. You ask the following specific questions:

A. Does VA have the authority to define scope of practice for all VA nursing roles, including Advanced Practice Registered Nurses (APRN), registered nurses (RNs) and Licensed Practical Nurses/Licensed Vocational Nurses (LPN/LVN), without regard to State Nurse Practice Acts?

B. Is this authority contradictory in any way to the requirement that all RNs and LPN/LVNs employed by VA have a current, active and unrestricted license from any State, commonwealth, territory or the District of Columbia?

C. Does VA have the authority to state that APRNs will function within an independent scope of practice as defined by their education and certification, regardless of how scope is defined by the State in which they are licensed?

BRIEF ANSWERS:

A. In its statutory role as a provider of a national health care system for the nation's veterans, VA has authority to establish qualifications for, and regulate the professional conduct of, its health-care practitioners. Accordingly, VA may determine the scope of practice of its nurses, without regard to individual State Practice Acts, for clinical nursing practice other than the prescribing of controlled substances.

Principal Deputy Under Secretary for Health (10A/108)

B. VA health care practitioners must be licensed in "a" State to practice their profession. However, this is an employment qualification. Under the Supremacy Clause of the Constitution, State licensing requirements may not be used to penalize or otherwise interfere with the authorized functions of the Department and its employees. If a State brings a licensure action against a VA nurse for following a VA scope of practice that is inconsistent with the State Practice Act, our Office, through Regional Counsel, would pursue all legal avenues to preempt the State action.

C. With the exception of controlled-substances-prescribing authority, which by Federal law requires adherence to State licensure requirements for such prescribing, VA may authorize APRNs to function as independent practitioners based on their education, certification, or other credentials regardless of the scope of practice defined by their licensure.

DISCUSSION:

1. Article VI, clause 2 of the United States Constitution establishes the supremacy of Federal law over State law:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

2. It is a well-established principle of constitutional law that Federal law is supreme, and States may not regulate or control the lawful actions of the Federal Government, absent Congressional consent. In the seminal case on Federal Supremacy, *McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819), the Supreme Court stated that "[i]t is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." Federal preemption of State law may be either express or implied. *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 98 (1992). Congress may make an express statement of pre-emption in Federal statutes. In the absence of statutory preemption language, preemption may be implied through "field preemption" or "conflict preemption." *Id.* When Congress intends Federal law to "occupy a given field," any State law within that field will be preempted. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000). In addition, where State regulation over a matter is not entirely displaced, State law will still be preempted to the extent it actually conflicts with federal law. *Id.* Such a conflict is found where it is impossible to comply with both State and Federal and law or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade*, *supra*, at 98 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *Crosby*, *supra* at 732.

3.

Principal Deputy Under Secretary for Health (10A/108)

3. State regulation of a Federal facility and its activities is permissible only where Congress affirmatively consents:

> Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is 'a clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous (citing *Mayo v. United States*, 319 U.S. 441, 445 (1943).

Hancock v. Train, 426 U.S. 167 (1976) (Federal facilities need not obtain State permits for emissions even though Federal law gives States authority to enforce air pollution regulations).

4. Similarly, without Congressional consent, States may not regulate or control the activities of Federal employees who are acting within the scope of their employment. In *Ohio v. Thomas*, 173 US 276, 284 (1899), the Supreme Court held that the Federal official governing a veterans home was not subject to State criminal prosecution for official acts he took in superintending the internal government and management of the Federal institution. See also *In re Neagle*, 135 U.S. 1, 59 (1890), which held that the State could not criminally prosecute a United States marshal who committed homicide during the performance of his official duties to defend and protect a United States Supreme Court Justice. The Supreme Court stated:

> In the view we take of the Constitution of the United States, any obligation fairly and properly inferable from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is a 'law,' within the meaning of this phrase.

Id. at 59. In *City of Jackson v. Jackson*, 235 F. Supp. 2d 532 (S.D. Miss. 2002), the Assistant Chief of Medical Administration Service of a VA hospital, who had been charged under State law with stalking a female hospital employee, was held immune from State criminal prosecution, where he was authorized to monitor the employee's workplace attendance and activities.

5. States also may not use licensing requirements as a means to regulate the activities of Federal employees or circumvent the determinations of the Federal Government:

> A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give "the State's licensing board a virtual power of review over the federal determination" that a person or agency is qualified and entitled to perform certain functions.

Sperry v. Florida, 373 U.S. 379, 385 (1963). In *Sperry*, the Supreme Court held that a Florida court could not enjoin a non-lawyer who was registered to practice before the United States Patent Office from preparing and prosecuting patent applications in Florida, notwithstanding that his conduct constituted the unauthorized practice of law in Florida. Similarly, in *Johnson v. Maryland*, 254 U.S. 51, 57 (1920), the Supreme Court held that the State lacked the power to require a U.S. Post Office Department employee to obtain a State driver's license in order to operate a motor vehicle within the State while performing his Federal job. The Court noted:

> 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[s] 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.

6. The Office of Legal Counsel (OLC) in the Department of Justice has analyzed the relationship of State licensure requirements to the regulation of the professional conduct of Federal attorneys during the performance of their duties. In 9 U.S. Op. Off. Legal Counsel 71, 1985 WL 185392 (August 2, 1985), OLC determined that State laws or court rules regulating the conduct of Federal employees in the performance of their official duties "constitute regulation of the activities of the federal government itself and are therefore also presumptively invalid." While noting that Justice Department attorneys are required by law to be licensed to practice their profession, OLC stated:

> [W]e do not believe that Congress' mandate to state and local bar associations extends to the imposition of rules of conduct that penalize or otherwise interfere with the performance of authorized federal responsibilities....
>
> The Department has consistently reserved the prerogative to determine the appropriate course of conduct for federal attorneys faced with a conflict between their official duties and state regulation. <u>The decision to authorize a Department attorney to take action inconsistent with a relevant state bar standard, which may subject that attorney to state disciplinary proceedings, will be made only after careful consideration of the surrounding circumstances. The Department's standard of conduct is not automatically given preference over any state bar standard without regard to the relative importance of the conflicting standards. Rather, we generally reserve reliance on the Supremacy Clause for those</u>

> occasions when a state bar standard impedes the authorized functions of the Attorney General and the Department of Justice, so that the Department cannot adequately carry out its functions if it adheres to the state standard.

Id. (Emphasis in original).

7. The same analysis could be applied to State Board disciplinary action against a Federal health care practitioner. Where there is no conflict between official Federal duties and the State professional practice regulations, the State would retain authority to discipline its Federal licensees for an act of unprofessional conduct. However, State disciplinary action that would penalize, or otherwise interfere with, a Federal health care practitioner's performance of official duties, would be preempted by the Supremacy Clause. At least one State has reached this conclusion with regard to State disciplinary action against its licensees who are Federal health care practitioners.

8. The Attorney General for the State of Arizona held that the Arizona State Board of Nursing did not have a right to discipline a federally employed Pediatric Nurse Practitioner (PNP) licensed by Arizona for prescribing and dispensing medications on a United States Air Force base without having obtained prescribing and dispensing authority as required by Arizona law, where the Air Force had established qualifications for such work. The Attorney General noted:

> Generally, prescribing and dispensing medication without first obtaining prescribing and dispensing authority as required by A.A.C. [Arizona Administrative Code] R4-19-507 would subject an Arizona licensee to Board discipline. Where the Air Force has specifically regulated the credentials and qualifications required to practice as an Air Force PNP pursuant to Air Force Instruction ("AFI") 44-119, Clinical Performance Improvement, § 6.10.2 and has authorized an Air Force PNP to prescribe and dispense medications, however, the Board may be preempted from taking disciplinary action against an Arizona licensee practicing exclusively on a federal enclave for lacking state prescribing and dispensing credentials.

2003 Ariz. Op. Atty. Gen. 32, *Re: Arizona Board of Nursing Jurisdiction over Licensees Who Practice Exclusively on Federal Enclaves* (December 3, 2003). The Attorney General also noted that, where the State's authority is not otherwise preempted, the Board would retain the authority to discipline a Federal employee licensed by Arizona if the holder commits an act of unprofessional conduct. *Id.*

9. In light of the above principles, we address your specific questions below.

A. Does VA have the authority to define scope of practice for all VA nursing roles, including Advanced Practice Registered Nurses (APRN), registered nurses (RNs) and Licensed Practical Nurses/Licensed Vocational Nurses (LPN/LVN), without regard to State Nurse Practice Acts?

10. Within the Department of Veterans Affairs, Congress has established the Veterans Health Administration (VHA), "[t]he primary function of which is to provide a complete medical and hospital service for the medical care and treatment of veterans, as provided in this title and in regulations prescribed by the Secretary pursuant to this title." 38 U.S.C. § 7301(b). To enable the Secretary to direct, control and manage the Department, Congress authorized the Secretary to prescribe all rules and regulations which are necessary and appropriate to carry out all the laws administered by the Department. 38 U.S.C. § 501. In addition to this broad general authority, the Secretary has a specific statutory duty to establish the qualifications for its health-care practitioners, determine the hours and conditions of employment, take disciplinary action against employees, and otherwise regulate the professional activities of those individuals. 38 U.S.C. § § 7401-7464. Unless specifically otherwise provided in Title 38, U.S.C., the Under Secretary for Health has been delegated the authority to "prescribe all regulations necessary to the administration of the Veterans Health Administration," subject to the approval of the Secretary. 38 U.S.C. § § 7304(a) and (b); 38 C.F.R. § 2.6(a). In carrying out these functions, VA has an obligation to ensure that patient care is appropriate and safe and its health care practitioners meet or exceed generally-accepted professional standards for patient care.[1]

11. When Congress has consented to State regulation of clinical practice, it has made such consent clear and narrowly focused. The Controlled Substances Act, 21 U.S.C. § § 801 et seq., and implementing regulations in 21 C.F.R. Part 1300, require a practitioner to possess a State license that authorizes the prescribing of controlled

[1] Following World War II, Congress enacted Public Law 79-293 which established VA's Department of Medicine and Surgery (DM&S), now the Veterans Health Administration, in order to ensure that veterans would be provided with the "finest medical and hospital service in the world." 91 Cong. Rec. 11659 (daily ed. December 7, 1945) (statement of Representative Allen during House debate on H.R. 4717, later enacted as ED AS Public Law 79-293). To ensure that VA would have available to it only highly qualified medical care personnel, Congress also established the comprehensive personnel system in Title 38, U.S.C., for certain medical employees in VHA, independent of the civil service rules. As noted above, the Secretary has wide ranging powers over the professional conduct of Title 38 employees.

substances. *See* 21 C.F.R. 1306.03(a).[2] In order to obtain such authority from the State, practitioners necessarily must comply with any State prerequisites, such as collaborative practice by an advanced practice registered nurse (APRN) with a physician. Federal law would require VA practitioners to comply with State licensure requirements in order to be authorized to prescribe controlled substances within VA. For other aspects of clinical practice, however, Congress has not affirmatively consented to State regulation of Federal practitioners. Accordingly, VA practitioners must follow VA rules and policies for clinical practice, irrespective of their State Practice Acts.

12. VA generally authorizes practice within the scope of a practitioner's State license. Among the States, the legal scope of practice for nursing varies widely. Some States authorize APRNs to see patients and prescribe medications without a physician's supervision. Others authorize nursing protocols that allow registered nurses to make certain independent medical care decisions that traditionally have been the responsibility of physicians or other licensed independent health care practitioners. Currently, VA nurses function as either licensed independent practitioners (such as some APRNs) who are granted clinical privileges, or dependent practitioners who practice within a scope of practice under a collaborative relationship with a physician. VA currently does not authorize nursing practice through protocols.

13. As the nation's health care system has expanded over the years, the role of nursing correspondingly has evolved. In its October 2010 Report, *The Future of Nursing*, the Institute of Medicine (IOM) notes that, "given the great need for more affordable health care, nurses should be playing a larger role in the health care system, both in delivering care and in decision making about care." IOM recommends that the tasks nurses are allowed to perform be determined by their education and training, not by the political decisions reflected in the varying state laws under which they work. IOM also recommends that nurses achieve higher levels of education and training to respond to expanding roles and need for greater competencies.

14. In fulfilling its statutory duty to provide safe and appropriate medical care to the nation's veterans, VA is free to establish clinical practice standards that are more expansive or otherwise inconsistent with State practice standards. VA already has

---

[2] Section 1306.03(a) provides that:

> (a) A prescription for a controlled substance may be issued only by an individual practitioner who is: (1) authorized to prescribe controlled substances by the jurisdiction in which he is licensed to practice his profession and (2) either registered or exempted from registration pursuant to Secs. 1301.22(c) and 1301.23 of this chapter.

done so in the areas of prescribing and administering medications. See VHA Directive 2008-049, *Establishing Medication Prescribing Authority for Advanced Practice Nurses* (8/22/2008) (VA may determine prescribing authority for non-controlled substances); VHA Directive 2010-028, *The Use of Unlicensed Assistive Personnel in Administering Medication* (6/9/2010) (licensed clinicians, such as RNs, may delegate certain medication administration to unlicensed assistive personnel (UAPs)). Pursuant to its authorities in 38 U.S.C. § § 7401-7464 over the professional conduct of its workforce, VA may conclude that its nurses who are qualified by education, training or other credentials are entitled to perform certain additional functions that the States would not allow. Where that is the case, enforcement of the State law would interfere with VA's activities and stand "as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Gade*, *supra*, at 98; *Crosby, supra,* at 732.

B. Is this authority contradictory in any way to the requirement that all RNs and LPN/LVNs employed by VA have a current, active and unrestricted license from any State, commonwealth, territory or the District of Columbia?

15. As a function of their police power, States regulate the practice of medicine within their borders, including licensure requirements and scope of practice limitations, to ensure the health and well-being of their citizens. In order to be employed by VA, its physicians, dentists, nurses, podiatrists, optometrists, pharmacists, psychologists, social workers, chiropractors, and certain other health care positions must be licensed or registered in "a" State to practice their profession. See 38 U.S.C. § 7402(b). This statutory employment qualification has raised concerns among VA's healthcare practitioners regarding whether States can regulate and control their professional conduct during the performance of their authorized VA duties. We have repeatedly held that States cannot. See VAOPGCADV 9-90, *Reporting Potential Child and Elderly Abuse: Conflicting Federal and State Laws* (Feb. 16, 1990) (State licensing requirements neither constitute Congress' consent to State regulation of VA employee job performance, nor authorize State officials to discipline VA employees for any Federally sanctioned conduct); VADIGOP, 1987 (5/14/87), *Disclosure of Information to a State Licensing Board – Conflict between State and Federal law* (employees must follow VA policy and procedures for reporting fellow employees to State licensing boards for professional conduct that fails to meet accepted standards of clinical practice).

16. Conflicts with State licensing boards have arisen in the past involving such clinical practice issues as informed-consent procedures, requirements for disclosure of information, delegations of clinical care, and the writing of orders and prescriptions by non-physicians. The Fifth Circuit Court of Appeals confronted such a conflict in the case *U.S. v. Composite State Bd. of Medical Examiners*, 656 F.2d 131 (5th Cir. 1981). The Georgia Board suspended the license of a National Health Service physician who,

in accordance with Federal law, had permitted a physician assistant who was not certified by Georgia to order routine medications in violation of Georgia law. The Federal Government sought declaratory and injunctive relief in Federal district court. Because there was an ongoing State proceeding, the Federal district court abstained from hearing the case. On appeal, the Fifth Circuit reversed and remanded for a determination on the merits, noting that the district court had ignored the Federal Supremacy issue, and "any state law that frustrates or conflicts with the lawful objective of a federal authority must yield to the federal authority." *Id.* at 135 note 4.

17. A State licensing board does not lose all jurisdiction over the professional practice of its licensees who are Federal employees. In order to avoid the appearance of "sheltering" or "protecting" its health care practitioners from reasonable State reporting standards, VHA has a policy of cooperating with inquiries from State licensing boards concerning clinical problems with a VA practitioner's patient care. See VHA Handbook 1100.18, *Reporting and Responding to State Licensing Boards* (September 22, 2005), at paragraph 15. However, where a licensure action would result in the State having a "virtual power of review over the federal determination of 'responsibility' to accomplish the federal task at issue," it effectively would constitute a challenge to the Federal policy and frustrate its purposes. *Gartrell Const., Inc. v. Aubry*, 940 F.2d 437, 439 (9th Circ. 1991). Thus, where VA determines a practitioner is competent to perform a task and approves a scope of practice, the State may not require additional qualifications.

18. Should a State revoke or restrict a VA nurse's license for following a VA-approved scope of practice, the State action would have a clear and disruptive effect on VA's operations. Not only could the licensure action disqualify the practitioner for VA employment, it would be tantamount to State prohibition of VA-approved conduct. Merely the threat of State disciplinary action could have a chilling effect on the willingness of VA nurses to follow Department policy that conflicts with their State Practice Acts. In this circumstance, we believe the Supremacy Clause would preclude the States from professionally disciplining VA nurses for conduct within the scope of their VA employment.

C. Does VA have the authority to state that APRNs will function within an independent scope of practice as defined by their education and certification, regardless of how scope is defined by the State in which they are licensed?

19. Although VA health care practitioners must possess at least one current, full and unrestricted license to practice their profession, Federal law does not require VA practitioners to be licensed to practice independently. See 38 U.S.C. § 7402(b); See VA Handbook 5005, Part II, Chapter 3, Section B, paragraph 13a. It is clear from the licensure requirements for independent practice by Department of Defense (DoD)

health care professionals that Congress knew how to construct such a requirement. Section 1094 of Title 10, U.S.C., states, in part:

> (a)(1) A person under the jurisdiction of the Secretary of a military department may not provide health care independently as a health-care professional under this chapter unless the person has a current license to provide such care. In the case of a physician, the physician may not provide health care as a physician under this chapter unless the current license is an unrestricted license that is not subject to limitation on the scope of practice ordinarily granted to other physicians for a similar specialty by the jurisdiction that granted the license.
>
> (2) The Secretary of Defense may waive paragraph (1) with respect to any person in unusual circumstances. The Secretary shall prescribe by regulation the circumstances under which such a waiver may be granted.

We interpret section 1094 to mean that DoD practitioners may provide health care independently only if their current license allows independent practice, unless the Defense Secretary waives the requirement in unusual circumstances. We note that DoD has exercised its waiver authority to allow mid-level practitioners, such as APRNs, to practice independently, regardless of their State licensure restrictions, in order to maintain their readiness for deployment. Congress has not expressly imposed on VA practitioners a similar licensure requirement for independent practice. Consequently, VA would not need similar statutory waiver authority in order to authorize its health care providers to practice independently.

20. By current policy, VA allows its practitioners to practice independently only if they possess a license that authorizes independent practice. Except for certain exceptions not relevant here,[3] VA cannot waive licensure to hire. However, as a matter of clinical policy judgment, VA can determine the scope of practice of its licensed health care practitioners without regard to State Practice Acts (with the exception of controlled substances prescribing authority). Thus, VA legally may determine the qualifications for, and establish a policy to allow, its mid-level practitioners to practice as independent providers, regardless of the scope of their licensure.

---

[3] See 38 U.S.C. 7407(b)(1) and (2) (research and academic positions that have no responsibility for direct patient care), and VA Handbook 5005, Part II, Chapter 3, subparagraph 14b (license limited on basis of non-citizenship or non-residency; academic or faculty license that permits full and unrestricted practice at the educational institute and its affiliates; time-limited or temporary license pending final approval of the State licensing Board; and residents with geographically limited licenses that allow independent practice within the permitted area at specific health care facilities).

11.

Principal Deputy Under Secretary for Health (10A/108)

Representation before State Licensing Boards

21. We cannot assure that a State will not initiate a licensure action against a VA employee for following VA policy that conflicts with the State Practice Act. However, if the State were to bring a licensure action against a VA nurse for conduct that is consistent with Federal law, VA rules or policies, our Office, through Regional Counsel, would notify the State Board that we believe such action would be unconstitutional. If the State were to persist, we would seek Department of Justice cooperation to pursue all legal avenues to intervene in the matter, move the matter into Federal court, and/or obtain an injunction to prevent the State action. We are confident the Department of Justice would agree to either represent such an employee or to pay for outside counsel to do so.

Will A. Gunn