STATE OF TENNESSEE
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Opinion No. 10-65

Medication Aides Certified

QUESTION

Senate Bill 3144/House Bill 3368 would amend Tenn. Code Ann. § 63-7-127 by adding a new subsection to clarify that, for the purposes of that section, a licensed nurse means a registered nurse or a licensed practical nurse. If a registered nurse is not specifically required in the chain of supervision, would this bill create a conflict with Tenn. Code Ann. § 63-7-108 by creating an impermissible chain of supervision?

OPINION

No. Senate Bill 3144/House Bill 3368, as amended, adds a new subsection (m) to Tenn. Code Ann. § 63-7-127 that clarifies that "[a] licensed nurse for the purpose of this section shall include a registered nurse, a licensed practical nurse, or either one." Thus, the proposed bill would clarify that a "medication aide certified" means an individual who administers medications as set forth in Tenn. Code Ann. § 63-7-127 under the general supervision of either a registered nurse or a licensed practical nurse pursuant to that section. In our view, this bill would not obviate the definition in Tenn. Code Ann. § 63-7-108 that the "practice of practical nursing" means the performance of selected acts required in the nursing care of the ill, injured or infirm and/or carrying out medical orders prescribed by a licensed physician or dentist under the direction of a licensed physician, dentist or professional registered nurse. Instead, by enacting this bill, the Legislature would clarify that a licensed practical nurse may re-delegate to a medication aide certified the task of administering medications that has been delegated to the licensed practical nurse by a licensed physician, dentist or registered nurse. In turn, Tenn. Code Ann. § 63-7-127(i)(2)(A)(x) requires the standard minimum curriculum in a medication aide training program to include the circumstances in which a medication aide certified should report to, or consult with, a licensed nurse regarding certain specific circumstances concerning a patient or patients to whom medications are administered.

ANALYSIS

Tenn. Code Ann. § 63-7-127, regarding the use of medication aides certified, took effect on July 1, 2009. That statute refers to the administration of medications by a medication aide certified as set forth in that section "under the general supervision of a licensed nurse" pursuant to that section. Tenn. Code Ann. § 63-7-127(a). Tenn. Code Ann. § 63-7-127(k)(1)(A) provides,

in pertinent part, that "[a] medication aide shall administer medication only pursuant to delegation by a licensed nurse," while Tenn. Code Ann. § 63-7-127(k)(3)(C) prohibits a medication aide certified from directly receiving orders from a physician or other medication prescriber. Further, "[d]elegation of medication administration to a medication aide certified shall be carried out in accordance with the rules for nursing delegation adopted under this chapter by the board of nursing." Tenn. Code Ann. § 63-7-127(k)(1)(B).

The statute provides that medication aides certified must hold a current, valid medication aide certificate issued by the Board of Nursing under the section. Tenn. Code Ann. § 63-7-127(b). The conditions for eligibility and the renewal requirements for such certification are set out in Tenn. Code Ann. § 63-7-127(e) – (g), and among these is the prerequisite that a medication aide certified first must be duly certified as a nurse aide under the standards established by federal law and Title 68, Chapter 11, Part 2 and have practiced as a certified nurse aide in a nursing home or assisted-care living facility for a minimum of one year, on a full-time basis, at the time the applicant submits an application for certification as a medication aide under Tenn. Code Ann. § 63-7-127. In addition to meeting other conditions as are set out in Tenn. Code Ann. § 63-7-127(e), an applicant for a medication aide certificate also shall successfully complete a course of instruction provided by a training program approved by the Board under Tenn. Code Ann. § 63-7-127(i) and pass a standardized examination as described in Tenn. Code Ann. § 63-7-127(j). Tenn. Code Ann. § 63-7-127(e).

The statute further requires that the Board shall adopt rules to implement the provisions of Tenn. Code Ann. § 63-7-127, and that initial rules shall be approved for a rulemaking hearing no later than February 1, 2010. The rules to be adopted under that section shall establish or specify five (5) specific areas, including fees, in an amount to cover the Board's costs in implementing the above section; procedures for renewal of medication aide certificates; grounds for discipline of applicants or certificate holders, or both; standards for approval of peer support programs for the holders of medication aide certificates; and procedures for approval or denial of medication aide training programs. Tenn. Code Ann. § 63-7-127(l).[1] The Board did hold a rulemaking hearing on January 21, 2010; however, some confusion arose about the statute and the scope of the Board's authority to craft rules regarding oversight of medication aides certified.

On March 9, 2010, during a discussion of the proposed bill, Nursing Board Chair Dr. Cheryl Stegbauer informed the House Health and Human Resources Professional Occupations Subcommittee that it was not the Board's intent to arbitrarily go against the will of the Legislature, and that she was not sure that the charge that the Legislature gave the Board was clear regarding whether the term licensed nurse required inclusion of both a licensed practical nurse and a registered nurse [in the rules to be adopted implementing the provisions of Tenn. Code Ann. § 63-7-127]. March 9, 2010 meeting, 106th Tennessee General Assembly, House Health and Human Resources Committee, Professional Occupations Subcommittee,

[1] The statute further authorizes rulemaking authority for the Board to establish any necessary rules for the administration of subsection (j)(regarding standardized medication aide examination services). Tenn. Code Ann. § 63-7-127(j)(2). As is mentioned above, it also references "the rules for nursing delegation adopted under this chapter by the board of nursing." Tenn. Code Ann. § 63-7-127(k)(1)(B).

http://tnga.granicus.com/MediaPlayer.php?view_id=31&clip_id=2518 at 30:20.) Further, Dr. Stegbauer admitted that the Board does not support the amendment to the bill and explained:

> The Medication Aide program is a new program. The Board is acting with due caution, with appropriate supervision in our rules, as the Medication Aide program begins. Once we have data from the Tennessee Medication Aide program we can determine whether it's safe to broaden the terms of supervision. We had rather have tighter oversight with such a new program that involves a vulnerable population than to try to be more restrictive after error has occurred. The issue for the Board is the responsibility for public safety. Oversight and supervision of these aides is critical. We want to prevent harm if at all possible, and I know that the legislators do also.

Id. at12:15.[2]

Therefore, Senate Bill 3144/House Bill 3368, as amended, adds a new subsection (m) to Tenn. Code Ann. § 63-7-127, which provides that "[a] licensed nurse for the purpose of this section shall include a registered nurse, a licensed practical nurse, or either one." If this bill is enacted, it will clarify the Legislature's intent that the Board of Nursing's rules shall include provisions for general supervision over a medication aide certified by a registered nurse, a licensed practical nurse, or either one. Although Board members (as well as certain legislators) have questioned the wisdom of permitting a licensed practical nurse to oversee a medication aide certified's administration of medication,[3] if this bill is enacted the Legislature will have spoken and it will be the Board's duty to promulgate rules that carry out the intent of the Legislature. "Administrative regulations cannot be inconsistent with statutes on the same subject." *Methodist Healthcare-Jackson Hosp. v. Jackson-Madison Co. General Hosp. Dist.*, 129 S.W.3d 57, 69 (Tenn. Ct. App. 2003) (citing *Kaylor v. Bradley*, 912 S.W.2d 728, 734 (Tenn. Ct. App. 1995)).

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[2] Representative Joanne Favors also expressed her views against the proposed legislation at the March 9, 2010 Professional Occupations Subcommittee meeting when she stated, in pertinent part: "Now, very briefly, there was a period during the '80's that we were trying to see how we could best utilize our nursing staff because we experienced nursing shortages. Nurses were going into other areas to work. And we implemented a model called the Medication Aide and RNs or LPNs in some instances were assigned to just administer medications on that unit and there were so many errors, there were so many problems, the nurses who were assigned to take care of the other aspects of patient care did not have the time to look up all of the drugs and all to see the interactions, contraindications, and it was a disaster. And it was tried all over the country. It was a disaster. This, too, will be a disaster. . . . I'm calling myself a prophet on this one because I know it's going to be a disaster. . . . .this is something we should not do. It is not a good bill and we should not do this." *Id.* at 40:46.

[3] The Tennessee Board of Nursing also promulgated a Position Statement regarding "Delegation of Medication Administration" before Tenn. Code Ann. § 63-7-127 took effect, which expressed the Board's position that it "will not approve a program for unlicensed persons to administer medication since such would reduce the quality of care which exists and may lower standards as recognized;" that the Board "supports only licensed personnel administering medications in nursing homes," and that "[i]t is a violation of the Nurse Practice Act for unlicensed persons to administer medications . . . . except when specifically exempted as in Tennessee Code Annotated [§] 63-7-102." The latter concern now appears to be obviated by the additional exemption in Tenn. Code Ann. § 63-7-102(13), which provides that "[n]othing in this chapter shall be construed as applying to: . . . . [e]xcept to the extent that it applies to the administration of medication, an individual who holds a valid medication technician certificate issued under this chapter, if the medication is administered in accordance with this chapter."

Tenn. Code Ann. § 63-7-108 defines the "practice of practical nursing" as "the performance for compensation of selected acts required in the nursing care of the ill, injured or infirm and/or carrying out medical orders prescribed by a licensed physician or dentist under the direction of a licensed physician, dentist or registered nurse." That section provides further that "[t]he licensed practical nurse shall have preparation in and understanding of nursing, but shall not be required to have the same degree of education and preparation as required of a registered nurse." Under existing Board rules, in certain circumstances a licensed practical nurse may delegate and supervise the performance of particular tasks by certain other persons who are exempt from the provisions of the Nurse Practice Act, although at present those delegable tasks that are described in the Board's current rules do not include the administration of medication. For example, Tenn. Code Ann. § 63-7-102(2) exempts from the provisions of the Nurse Practice Act, Tenn. Code Ann. §§ 63-7-101, *et seq*., "[p]ersons employed in the office of a licensed physician or dentist, assisting in the nursing care of patients where adequate medical or nursing supervision or both is provided." In turn, Tenn. Comp. R. & Regs. 1000-02-.04(2)(c), contained in the Rules and Regulations of Licensed Practical Nurses, exempts the following:

> Persons employed in institutions, agencies, or in the office of a licensed physician or dentist, assisting in the nursing care of patients where adequate medical or nursing supervision or both is provided. Assisting is defined to mean helping, aiding, or cooperating. Adequate supervision is defined to mean overseeing and inspecting with authority. The basic responsibility of the individual nurse who is required to supervise others is to determine which of the nursing needs can be delegated safely to others, and to determine whether the individual to whom the duties are entrusted must be supervised personally.

The rule goes on to describe certain tasks that are commonly performed by such persons. Tenn. Comp. R. & Regs. 1000-02-.04(2)(c)1-11. Similarly, the analogous Rules and Regulations for Registered Nurses, Tenn. Comp. R. & Regs. 1000-01-.04(2)(c), contain the same requirements as applied to registered nurses.

Therefore, when the above provisions are coupled with the separate and specific exemption from the provisions of the Nurse Practice Act for medication aides certified that is found in Tenn. Code Ann. § 63-7-102(13),[4] it does appear that there would exist a permissible chain of supervision wherein the physician, dentist or registered nurse delegates the task of administering medication to a licensed practical nurse under Tenn. Code Ann. § 63-7-108 who, in turn, re-delegates such task to a medication aide certified. Thus, a registered nurse or a physician or dentist necessarily remains in such chain of supervision/delegation, and a medication aide who holds a current, valid medication aide certificate under that chapter may administer medications as set forth in Tenn. Code Ann. § 63-7-127 to the residents of nursing homes or assisted care living facilities that use medication aides pursuant to that section, but a

[4] As is mentioned above, Tenn. Code Ann. § 63-7-102(13) provides that "[n]othing in this chapter shall be construed as applying to: . . . . [e]xcept to the extent that it applies to the administration of medication, an individual who holds a valid medication technician certificate issued under this chapter, if the medication is administered in accordance with this chapter."

medication aide "shall administer medications only pursuant to delegation by a licensed nurse." Tenn. Code Ann. § 63-7-127 (k)(1)(A).[5] However, we would also caution that certain methods of medication administration by licensed practical nurses are prohibited or circumscribed by Tenn. Comp. R. & Regs. 1000-02-.15; and that medication aides certified are prohibited from administering certain medications and/or using certain methods of medication administration specified in Tenn. Code Ann. § 63-7-127(k)(3),(4) and (5).

Thus, by enacting Senate Bill 3144/House Bill 3368, as amended, the Legislature would clarify that a "medication aide certified" means an individual who administers medications as set forth in Tenn. Code Ann. § 63-7-127 under the general supervision of either a registered nurse or a licensed practical nurse pursuant to that section. In our view, this bill would not obviate the definition in Tenn. Code Ann. § 63-7-108 that the "practice of practical nursing" means the performance of selected acts required in the nursing care of the ill, injured or infirm and/or carrying out medical orders prescribed by a licensed physician or dentist under the direction of a licensed physician, dentist or professional registered nurse. Instead, by enacting this bill, the Legislature would clarify that a licensed practical nurse may re-delegate to a medication aide certified the task of administering medications that has been delegated to the licensed practical nurse by a licensed physician, dentist or registered nurse. In turn, Tenn. Code Ann. § 63-7-127(i)(2)(A)(x) requires the standard minimum curriculum in a medication aide training program to include the circumstances in which a medication aide certified should report to, or consult with, a licensed nurse regarding certain specific circumstances concerning a patient or patients to whom medications are administered.

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[5] It is possible, under Tenn. Code Ann. § 63-7-108, that a registered nurse would not be involved if a licensed practical nurse received medical orders prescribed by a licensed physician or dentist and if such licensed practical nurse, acting under the direction of such licensed physician or dentist, then appropriately delegated a task of medication administration to a medication aide certified under the provisions of Tenn. Code Ann. § 63-7-127.

Requested by:

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