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R 76-141



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76-128

April 19, 1976

Mr. Richard F. Jaskiewicz, R.N., Member
Board of Examiners of Nursing Care Institution Administrators
Pima County General Hospital
2600 South Sixth Avenue
Tucson, Arizona

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Dear Mr. Jaskiewicz:

This is in response to your letter of March 11, 1976, wherein you ask if a conflict of interest exists when members of the Board of Examiners of Nursing Care Institution Administrators vote on the choice of examination to be given for licensing purposes to nursing care institution administrators which the Board members themselves must take.

Prior to January 1, 1976, the effective date of Title 36, Chapter 4, Article 6, no provisions existed in Arizona for the licensure of administrators of nursing care institutions. In choosing to license this function, the Arizona Legislature delegated the responsibility for licensing to the simultaneously created Board of Examiners of Nursing Care Institution Administrators consisting of five members (A.R.S. § 36-446.02.A). The professional composition of the board, appointed by the Governor, is legislatively directed by A.R.S. § 36-446.02.B.:

The board shall include one administrator of a non-profit skilled nursing facility, one administrator of a proprietary skilled nursing facility, one administrator of a residential care facility and two members representative of the professions concerned with the care and treatment of the critically ill or infirm patients. No more than two members of the board shall be from a single profession.

And in paragraph C of the same statute, the Legislature addressed the question of financial interest:

The noninstitutional members of the board shall have no direct financial interest in nursing care institutions.



Mr. Richard F. Jaskiewicz, R.N.
April 19, 1976
Page Two

Specifically, then, the Legislature directed that this board develop rules and select and administer examinations to individual applicants for licensure. (A.R.S. §§ 36-446.03 and 446.04.A.3).

Seven years prior to the passage of the nursing care institution administrator's licensing legislation, the Legislature passed a general conflict of interest statute (A.R.S. §§ 38-501 et seq.). That legislation withstood judicial attack in Yetman v. Nauman, 16 Ariz. App. 314, 492 P.2d 1252 (1972), where the Court of Appeals concluded that it was designed to disqualify persons in public office or employ from participating in decisions by which they stood to gain or lose something of a pecuniary or proprietary nature. Yetman, supra, at 317.

At the outset, it is significant to note that there is no reason to believe from this opinion request or any other information known to me at this time that any member of the board has any direct financial interest in the choice of any particular test for licensing purposes. Nor have I any reason to suspect bad faith or absence of objective independent judgment in the choice of tests [based upon information now known by me].

The possibility of conflict here can arise not only from particular actions or relationships of board members or their role in the delivery of nursing care but also from legislative choice of regulatory schemes. By definition, prior to the enactments on licensure of administrators, there were no licensed administrators in Arizona. The legislative decision to place nursing home administrators on the board which will develop specific procedures for the testing and licensing of nursing home administrators invariably results in those persons being legislatively directed to vote upon matters in which they have an arguably competing interest.

For example, if tests A and B are two commonly used licensing tests in other states and A has a higher passing rate as administered in other states, then the decision to use A in Arizona, for whatever reason, could, quite conceivably, raise questions of conflict by the administrator members of the board whose test passage would be eased by their decision. Conversely, the decision to use test B could raise questions of conflict based upon the theory that the more difficult test would limit entry into their occupational field with resulting economic benefits based on the principles of supply and demand. This same dilemma might be said to be true whether or not experts consider test A to be a more reliable indicator of the necessary professional competence.

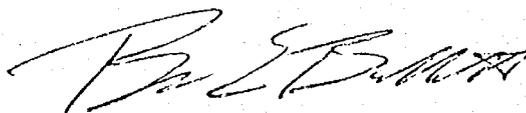
This analysis is not, however, dispositive of the legal issues. While the board is a board within the purview of the conflict of interest statute (A.R.S. § 38-501.A), the extent to

Mr. Richard F. Jaskiewicz, R.N.
April 19, 1976
Page Three

which the administrator licensure provisions take precedence over the conflict of interest statutes or the alleged conflict as one falling within the scope of A.R.S. § 38-503 is yet to be answered.

The conflict of interest law was passed by the Legislature in 1968. With presumed complete knowledge of that law and its operation, the Legislature subsequently passed a more specific law permitting a board composed of 40% nursing care institution administrators, not yet licensed, to decide what the specifics of the licensing criteria applicable to them should be. Well-recognized rules of statutory construction require preferences of specific rules over general rules in the event of ambiguity. Yauch v. State, 109 Ariz. 576, 514 P.2d 709 (1973). And where two statutes may conflict, the one passed last controls. Willard v. Hubbs, 30 Ariz. 417, 248 P.32 (1926). Thus, here where a general treatment of the subject of conflict of interest is followed by a subsequent specific enactment, the latter governs in the event of ambiguity. Accordingly, it must be assumed that in enacting A.R.S. §§ 36-446 et seq. the Legislature intended to carve out an exception to the conflict of interest statutes, A.R.S. §§ 38-501 et seq., by permitting certain persons to vote upon matters in which they have an interest. However, even if the conflict statute were applicable, the decision of the Court of Appeals in Yetman v. Nauman, 16 Ariz. App. 314, 492 P.2d 1252 (1972), interprets our conflict of interest statute as applying to pecuniary interests. Thus, it is questionable whether the test vote involves a substantial interest rising to the level of a statutory conflict.

Sincerely,



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Attorney General

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