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August 3, 1977

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The Honorable Jim Skelly
Arizona State Representative
House Wing, State Capitol
Phoenix, Arizona 85007

Re: 77-156 (R77-221)

Dear Representative Skelly:

Your letter of June 24, 1977, requests our opinion on the following question:

May the Board of Examiners of Nursing Care Institution Administrators require the payment of a licensure fee of fifty dollars for a newly licensed administrator and subsequently require a fifty dollar annual license renewal fee where less than a year has elapsed since the payment of the first fee.

A.R.S. § 36-446.03.A grants the Board of Examiners of Nursing Care Institution Administrators the power to set "fees of not more than one hundred dollars for examination and of not more than fifty dollars for licensure." Further, A.R.S. § 36-446.04.C provides that licenses are renewable annually. Pursuant to this authority the Board has adopted a regulation that requires a successful applicant for licensure to pay a license fee of fifty dollars within 90 days of notification that he has passed the examination. A.C.R.R. R4-3319.B.

Apparently for administrative purposes, the Board has provided that all licenses expire not within one year of their initial issuance but instead on June 30. A.C.R.R. R4-33-20.A. A renewal application for licensure must be accompanied by a fifty dollar fee. A.C.R.R. R4-33-19.D.

Accordingly in the situation posed the operation of the Board's regulation requires payment of both fifty dollar fees - original and renewal - without proration. The question remains, however, whether when the Board's regulations

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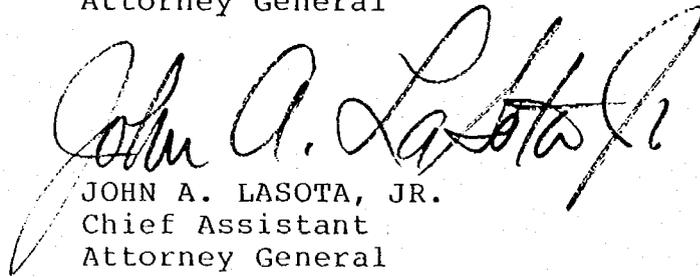
are applied in this fashion, they violate the standards prescribed by the legislature. It is basic that an administrative agency may not exercise its rule making power beyond or in contradiction of that expressed in their enabling legislation. Swift and Co. v. State Tax Commission, 105 Ariz. 226, 462 P.2d 775 (1969).

In this statutory scheme the Legislature has, by the interrelationship of two separate sections, limited the licensure fee to a maximum of fifty dollars for a one year period. A.R.S. §§ 36-446.03.A and 446.04.C. Any attempt to charge more than fifty dollars for one year or fifty dollars for less than one year would violate the maximum fee. Accordingly an attempt to charge a fifty dollar licensure fee for less than a year conflicts with this statutory charge. If the Board chooses one annual renewal date and an initial licensure does not coincide with this annual renewal date, the fee for initial licensure must be prorated.

We recommend that the Board notify all potentially aggrieved licensees of the substance of this opinion and permit them to make a claim for refund of the wrongfully collected portion of the unprorated fee. The Board should then make refund, in appropriate cases, pursuant to A.R.S. § 35-191.D.

Very truly yours,

BRUCE E. BABBITT
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