



# Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert R. Corbin

October 16, 1987

The Honorable Carl J. Kunasek  
Arizona State Senator  
State Capitol - Senate Wing  
Phoenix, Arizona 85007

Re: I87-126 (R86-141)

Dear Senator Kunasek:

This letter is in response to your request for an opinion whether A.A.C. R9-10-616 requires supervisory care facilities to have an employee awake on the premises at all times or whether compliance with this regulation can be accomplished by the use of a combination of safety devices and non-awake staff. We conclude that A.A.C. R9-10-616 requires licensed supervisory care facilities to have an employee on the premises who is awake at all times and that the requirements of the regulation will not be satisfied by the use of safety devices and non-awake personnel.

The Arizona Department of Health Services ("ADHS") is charged with the duty to adopt rules establishing health care institution licensing requirements (A.R.S. § 36-405) and with the enforcement thereof (A.R.S. § 36-406). Essential to the administration of the licensing scheme is the authority to reasonably construe applicable statutes and regulations. "Ordinarily, an agency's interpretation of a statute or regulation which it implements is entitled to great weight." Marlar v. State, 136 Ariz. 404, 411, 666 P.2d 504, 511 (App. 1983); see also Arizona Department of Economic Security v. Magma Copper Company, 125 Ariz. 23, 26, 607 P.2d 6, 9 (1980). The Arizona Supreme Court has held that "where any serious doubt as to the proper interpretation exists we will not adopt one different from that adopted by the appropriate administrative body." Jenney v. Arizona Express, Inc., 89 Ariz. 343, 346, 362

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P.2d 664, 667 (1961). Furthermore, a statute whose purpose is the protection of public health and welfare is entitled to a liberal construction for the accomplishment of its beneficent objective. State v. Sanner Contracting Co., 109 Ariz. 522, 524, 514 P.2d 443, 445 (1973).

A.A.C. R9-10-616 provides, in pertinent part:

B. Sufficient personnel shall be employed to ensure the well being of the residents . . . .

C. At all times when residents are present, at least one employee on duty on the premises shall have satisfactorily completed eight hours of basic first aid training.

(Emphasis added.)

In addition, A.A.C. R9-10-612(9) requires that the supervisory care services provided to residents shall include "general supervision." "General supervision" is defined as "protective oversight including . . . ability to intervene in a crisis situation." A.A.C. R9-10-612(9).

It is important to be aware also that while residents of supervisory care facilities must be independent in accomplishing most activities of daily living, they need only be, among several other things, "[u]sually in contact with reality" and "[m]ay be forgetful or exhibit minor judgment defects . . . ." A.A.C. R9-10-613 (emphasis added).

In order to interpret R9-10-616(C) correctly in light of the foregoing, it is necessary to determine the meaning of "on duty." "The same principles of construction that apply to statutes apply to rules and regulations promulgated by an administrative body." Marlar v. State, 136 Ariz. at 410, 666 P.2d at 510. "Words and phrases shall be construed according to the common and approved use of the language." A.R.S. § 1-213. In determining the intent of the promulgating agency, a regulation "is to be given such an effect that no clause, sentence or word is rendered superfluous, void, contradictory or insignificant." Marlar v. State, 136 Ariz. at 411, 666 P.2d at 511. See also State v. Deddens, 112 Ariz. 178, 182-183, 608 P.2d 317, 321-322 (App. 1980). Under this rule of statutory

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construction, different words and phrases must be construed as having different meanings. Torrez v. State Farm Mutual Auto Insurance Company, 130 Ariz. 223, 226, 635 P.2d 511, 514 (App. 1981).

The supervisory care regulations draw an unmistakable distinction between the requirement that one employee with first aid training be "on duty" (R9-10-616(C)) and the provision in R9-10-615(A) that the manager or designee be "on the premises at all times . . . ." (Emphasis added.) If it were sufficient for persons with first aid training to be merely "on the premises," whether awake or asleep, the regulation would utilize language similar to that contained in R9-10-615(A). Furthermore, when one considers the requirement that a supervisory care facility provide protective oversight which includes the "ability to intervene in a crisis situation" (A.A.C. R9-10-612(9)) coupled with the mandate of A.A.C. R9-10-616(C), one can only conclude that it is the intent of the regulations that at least one employee with first aid training be awake, alert and promptly available to deal with a crisis which may occur at any time of the day or night.

Your letter also states that: (1) a number of supervisory care facilities have installed "effective devices that thoroughly safeguard the health and welfare of their residents . . . .;" and (2) the Director's Advisory Committee on Long Term Care concluded that supervisory care facilities need not have a staff member awake at all times.

While a number of supervisory care facilities may have installed call button systems to awaken sleeping staff members, it is our understanding that such alarm systems must be activated by the resident in distress or another person who is aware of the crisis. They do not go off if a person falls, suffers a medical emergency or is the victim of a catastrophic situation while out of reach of the call button. Neither do these alarms emit a signal if a confused resident wanders out of his room, leaves the facility's grounds, fails to lock his door, or is the victim of violent crime. It is within the agency's authority to determine that an alarm system simply does not meet the requirement that an employee be on duty, nor provide the protective oversight necessary to assure crises intervention. Marlar v. State, 136 Ariz. at 411, 666 P.2d at 511.

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In response to your assertions regarding the report of the Director's Advisory Committee on Long Term Care, that report contains recommendations to the Director of ADHS on methods of improving the provision of long term care services. Its contents, however, do not reflect the current state of the law regarding compliance with health care institution licensure requirements and does not have the force and effect of law as do statutes and administrative rules. Furthermore, the report recommends that "24-hour guidance or protective oversight" should be afforded. The report does not address the question whether it is necessary that a staff member be awake at all times, nor does it indicate that the phrase "protective oversight" should have a different meaning than that which is operative under present law.

Based upon the foregoing discussion, the Arizona Department of Health Services is authorized both to adopt rules and regulations governing supervisory care facilities and to interpret these regulations to require that such facilities provide at least one staff member who is awake at all times.

Sincerely,



BOB CORBIN  
Attorney General

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