

STATE OF ARIZONA
OFFICE OF THE ATTORNEY GENERAL

<p>ATTORNEY GENERAL OPINION</p> <p>by</p> <p>TERRY GODDARD ATTORNEY GENERAL</p> <p>December 3, 2003</p>	<p>No. I03-009 (R03-016)</p> <p>Re: Arizona Board of Nursing Jurisdiction over Licensees Who Practice Exclusively on Federal Enclaves</p>
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TO: Joey Ridenour, Executive Director
Arizona State Board of Nursing

Questions Presented

You have asked whether the Arizona State Board of Nursing ("Board") retains jurisdiction to discipline for unprofessional conduct those of its licensees or certificate holders, or the licensees or certificate holders from the Compact states, who practice exclusively on federal enclaves within the State of Arizona.¹

¹ The Nurse Practice Act ("Act") establishes the Board as the agency authorized to regulate the practice of nursing in Arizona. The Board's licensee's include Nurse Practitioners, Nurse Midwives, Certified Registered Nurse Anesthetists, Registered Nurses, Licensed Practical Nurses and Certified Nursing Assistants. The Board's statutes and rules establish the scope of practice for licensees and parameters for imposing discipline against their licenses. Arizona Revised Statutes ("A.R.S.") §§ 32-1601 through -1669; Arizona Administrative Code ("A.A.C.") R4-19-101 through -815.

Summary Answer

Unless otherwise preempted by federal law, the Board has the authority to discipline for unprofessional conduct its licensees and certificate holders, and those of the Compact states, who practice exclusively on federal enclaves within the State of Arizona for violations of the Nurse Practice Act.²

Background

In 1989, the Board asked this Office to issue a formal opinion regarding whether the Board had jurisdiction over those licensees who practice in federal hospitals in Arizona or in other states, or on Indian reservations within Arizona. In Ariz. Atty. Gen. Op. I89-090, this Office opined that "the Nursing Board has jurisdiction over Arizona licensed nurses." The Opinion further stated that "the fact that a nurse chooses to practice on an Indian reservation or at a federal facility within or without Arizona does not alter the authority of the Nursing Board with respect to an Arizona license." Based upon this advice, the Board has historically imposed disciplinary sanctions on state licensees who violate the Nurse Practice Act while working for the federal government.

Your opinion request raises a particular concern about whether a state licensed nurse practitioner who works as a Pediatric Nurse Practitioner ("PNP") exclusively on a United States Air Force base may, in the course and scope of her federal employment, prescribe and dispense medications without having obtained prescribing and dispensing authority as required by Arizona

² In 2001 Ariz. Sess. Laws, ch. 101, § 1, the Arizona Legislature enacted A.R.S. § 32-1668, which joined Arizona as one of the Nursing Compact states. Thus, while the Attorney General opined in 1989 that the Board did not have the authority to discipline nurses licensed in other jurisdictions who worked for the federal government on land in Arizona, A.R.S. § 32-1668 distinguishes that part of the Opinion. Pursuant to the Compact, the Board now has broader authority to take disciplinary action against any nurse licensed in another Compact state who renders medical aid to patients in Arizona. A.R.S. § 32-1669(A).

law.³ Generally, prescribing and dispensing medication without first obtaining prescribing and dispensing authority as required by A.A.C.R. 4-19-507 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.

Analysis

A. The Board Retains Jurisdiction Over Licensees Employed on Federal Enclaves When Their Actions are Not Subject to Federal Preemption.

In 1989, this Office generally concluded that if a federally employed professional obtains and maintains a state license, the state issuing that license retains the right to discipline that professional for violations of its practice act. That conclusion is more recently supported by *Colorado State Board of Medical Examiners v. Sullivan*, 976 P.2d 885 (Colo. App. 1999), where the court considered whether the Colorado Medical Board had exceeded its jurisdiction by revoking the state license of a civilian physician for treatment he rendered while employed at a federal military reservation hospital. The court determined that the medical board's authority to investigate and take disciplinary action against any licensee who engages in unprofessional conduct applies to conduct occurring both within and without Colorado, in order to protect the "citizenry against unauthorized,

³ Arizona Administrative Code ("A.A.C.") R4-19-507 requires that nurse practitioners obtain from the Board additional authority beyond their basic licensing status to prescribe and dispense medication. It expressly states that an Arizona licensed nurse practitioner may not prescribe or dispense medications without having the prior authority to do so from the Board.

unqualified, and improper practice of the healing arts in this state." *Id.* at 887-88. Specific to federal enclaves, the court recognized Congress's "exclusive legislative jurisdiction over the land that the United States has acquired," but determined that the medical board had simply revoked Sullivan's license to practice medicine in Colorado, and that it was not attempting to regulate or legislate medical practice on the federal enclave in violation of the federal Supremacy Clause. *Id.* at 888.

Under *Sullivan*, and as noted in Ariz. Atty. Gen. Op. I89-090, the Board may generally apply its statutory authority to discipline a federal employee who holds an Arizona or Compact license or certificate when that individual commits unprofessional conduct, regardless of whether the federal government might also take action for that same conduct. Nevertheless, there are circumstances where the Board may be prevented from acting, notwithstanding a violation of state law.

B. A State Cannot Enforce Its Law on a Federal Enclave when it is Preempted by Federal Law.

A fundamental principle of constitutional law is that Congress has the power to preempt state law. U.S. Const. art. VI, cl. 2; *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). State law is preempted where, under the circumstances of a particular case, it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Crosby*, 530 U.S. at 372-73. Even where the federal statute lacks an explicit preemption provision, state law is preempted by a congressional act in the following circumstances: 1) where Congress intends federal law to "occupy the field"; 2) where state law conflicts with a federal statute; and 3) where it is impossible for a private party to comply with both state and federal law. *Id.* In determining whether a federal law preempts state law, the entire statutory scheme must be considered. "If the purpose of the act cannot otherwise be accomplished – if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect --the state law must yield to the

regulation of Congress within the sphere of its delegated power." *Id.* at 373 (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)).

Several courts have considered whether federal law preempts state law licensing requirements for federal workers. In *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956), the United States Supreme Court held that an Arkansas statute requiring contractors engaged in construction work costing \$20,000 or more to obtain a license conflicted with and therefore was preempted by the Armed Services Procurement Act of 1947 (the "Act"), 62 Stat. 21, 23, 41 U.S.C. §162 (current versions at 10 U.S.C.A. §§ 2301, -2303 through -2306, -2313). In reaching this conclusion, the Court found that subjecting a federal contractor to the Arkansas requirements would give the State's licensing board "a virtual power of review" over the federal determination of a contractor's qualifications and thus would frustrate express federal policy by adding qualifications in addition to those which the federal government had determined sufficient. *Leslie Miller*, 352 U.S. at 189-90. *See also Elec. Constr. Co. v. Flickinger*, 107 Ariz. 222, 485 P.2d 547 (1971) (citing *Leslie Miller* and holding that a subcontractor who was engaged to perform work on an Air Force base was not required to obtain a state contractor's license, even though the government had not made a direct determination of the subcontractor's qualifications).

In *Gartrell Constr., Inc. v. Aubry*, 940 F.2d 437 (9th Cir. 1991), the Ninth Circuit Court of Appeals considered whether a general construction contractor, who did not hold a California contractor's license, had violated California's Labor Code by contracting with the United States Department of the Navy to perform work at a Marine Corps Air Station located within the state. *Id.* at 438. The federal court enjoined California from enforcing the Labor Code against the contractor, holding that such application was preempted by federal law:

[A] state licensing requirement is invalid as applied against a contractor with the federal government because it results in interference with federal government functions and is in conflict with federal procurement legislation; its application is therefore precluded by the Supremacy Clause of the United States Constitution.

Id. (quoting *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956)). The court noted that when the factors a state considers before granting a professional license are similar to those the federal government considers in determining responsibility, the doctrine of Federal Supremacy acts to restrict the state from gaining a "virtual power of review over the federal determination of 'responsibility'" to accomplish the federal task at issue. *Id.* at 439. "Because the federal government made a direct determination of [the contractor's] responsibility, [the state] may not exercise a power of review by requiring [the contractor] to obtain state licenses." *Id.* at 441.

The Air Force credentials a PNP in accordance with AFI 44-119 § 6.10.2. In order to be certified as a PNP, this regulation requires graduation from an accredited baccalaureate degree program in nursing; completion of an approved nurse practitioner program; a master's degree from an accredited program in the specialty; licensure as an RN from at least one United States jurisdiction; and national certification in the speciality. AFI 44-119 § 6.10.2. The Air Force does not require any additional certification in order to prescribe and dispense medications on a United States Air Force base.

When the Air Force has determined that a nurse practitioner is "responsible" and has granted the nurse credentials and privileges to practice as a PNP for the Air Force, including prescribing and dispensing medication, the State cannot impose additional qualifications. Requiring an Air Force PNP to comply with the requirements of A.A.C. R4-19-507 to obtain prescribing and dispensing authority would add qualifications beyond those which the federal government has determined to

be sufficient, and would result in the identical conflict which was found to frustrate federal policy in the cases cited above. *Flickinger*, 107 Ariz. at 224, 485 P.2d at 549. Accordingly, when Arizona licensed nurse practitioners practicing on federal enclaves have been granted the authority to prescribe and dispense medications by federal law, the Board's authority to discipline such licensees for performing these responsibilities without first complying with state requirements is preempted.

Conclusion

Federal preemption prohibits the Board from requiring additional state licenses or certifications in order to practice on a federal enclave when federal law establishes qualifications for such work. When such preemption does not exist, however, the Board has the authority to take state disciplinary action against a federal employee who holds an Arizona or Compact license or certificate if the holder commits an act of unprofessional conduct.

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