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April 2, 2019

Dennis Lewis
President of the West Virginia Board of Pharmacy
2310 Kanawha Blvd. East
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Dear President Lewis:

You have asked for an Opinion of the Attorney General about the jurisdiction of the West Virginia Board of Pharmacy (“the Board”) in cases where a pharmacy is located within a larger store or retail establishment. This Opinion is issued pursuant to W. Va. Code § 5-3-1, which provides that the Attorney General “shall give written opinions and advice upon questions of law . . . whenever required to do so, in writing, by . . . any . . . state officer, board, or commission.” To the extent this Opinion relies on facts, it is based solely on the factual assertions provided in your correspondence with the Office of the Attorney General.

In your letter you explain that the Board has “declared that the sale of cannabidiol (“CBD”) in [a] pharmacy setting is prohibited.” You note that, because some pharmacies are located within larger retail establishments, the “Board is unclear where its jurisdiction ends” in cases where a store that “contain[s] a pharmacy . . . wish[es] to sell CBD outside of the pharmacy setting but still within the facility.” Specifically, you ask whether “the entire store” may be “considered a pharmacy”—and thus subject to the regulatory authority of the Board—in circumstances like these.

Your letter raises the following legal question:

Where a larger retail establishment contains a pharmacy, does the authority of the West Virginia Board of Pharmacy extend to the entire premises, or only the specific area where drugs are dispensed or pharmacist care is provided?

We conclude that the Board’s jurisdiction under W. Va. Code § 30-5-7 does not extend to different departments and areas of a larger store that contains a separate pharmacy area.

Discussion

The Board’s authority, which is set forth in Chapter 30, Article 5 of the West Virginia Code—the Pharmacy Practice Act—includes the power to promulgate rules for the “[r]egulation of pharmacies.” W. Va. Code § 30-5-7(23). As used within Article 5, a “pharmacy” means “any place within this state where drugs are dispensed and pharmacist care is provided and any place outside of this state where drugs are dispensed and pharmacist care is provided to residents of this state.” *Id.* § 30-5-4(53). The same code section also defines the two components of this definition: what it means for “drugs” to be dispensed and for “pharmacist care” to be provided. First, a “drug” is a substance that is (1) so recognized “by the United States Food and Drug Administration, or in any official compendium, or supplement”; (2) “designated by the board, for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or other animals”; (3) “other than food, intended to affect the structure or any function of the body of human or other animals”; or (4) “intended for use as a component of” a substance described in the prior categories. *Id.* § 30-5-4(19)(A)-(D). Second, “pharmacist care” is defined as “the provision by a pharmacist of patient care activities, with or without the dispensing of drugs or devices, intended to achieve outcomes related to the cure or prevention of a disease, elimination or reduction of a patient’s symptoms, or arresting or slowing of a disease process.” *Id.* § 30-5-4(50).

What these definitions do not make clear, however, are a pharmacy’s boundaries. To be sure, the Board has authority to promulgate legislative rules within the portion of a store designated specifically as a pharmacy and separated from the rest of the store by counters and other barriers. Drugs are dispensed and pharmacist care is certainly provided from locations like these, which makes them “pharmacies” for purposes of the Board’s authority under Section 30-5-7. It is less clear whether the fact these activities occur in some part of a store means that the entire premises can be considered a “pharmacy.”

The West Virginia Supreme Court of Appeals has not addressed this question, so we turn instead to first principles. Where a statute is “clear and without ambiguity,” courts apply its “plain meaning . . . without resorting to the rules of interpretation.” Syl. pt. 3, *Francis O. Day Co. v. Dir., Div. of Envtl. Prot.*, 191 W. Va. 134, 443 S.E.2d 602 (1994). Yet here, the definition of “pharmacy” in Section 30-5-4(53) begins with the words “any place.” And “place” is a “very indefinite term.” *Deluxe Black’s Law Dictionary* 1148 (6th ed. 1990). A broad reading of “any place” might extend the Board’s jurisdiction to the entirety of any retail establishment that contains a pharmacy. But a more narrow reading—construing “any place” to mean the specific area where drugs are dispensed and pharmacist care provided—might limit the Board’s authority to only the area behind an in-store pharmacy’s counter. The statute is thus ambiguous—or “susceptible of two or more constructions,” *Crocket v. Andrews*, 153 W. Va. 714, 718, 172 S.E.2d 384, 386 (1970)—and must be interpreted using the traditional tools of statutory construction.

These tools suggest that a reviewing court would likely interpret “any place” narrowly. Looking first to legislative intent, the text and structure of the Pharmacy Practice Act itself provides little guidance. *Cf.* Syl. pt. 2, *Farley v. Buckalew*, 186 W. Va. 693, 414 S.E.2d 454 (1992) (“The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” (citation omitted)). There is no broad statement of purpose, for example, nor any textual directive about how the statute’s provisions should be construed. Nevertheless, our

supreme court has repeatedly emphasized that because agencies “are creatures of statute and delegates of the Legislature,” their powers are limited to “such as have been conferred upon them by law expressly or by implication.” Syl. pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citation omitted). Courts thus “presume that the Legislature did not intend to confer upon the agency any greater authority than what is *clearly indicated in the statutory language.*” *Reed v. Thompson*, 235 W. Va. 211, 215, 772 S.E.2d 617, 621 (2015) (emphasis added). Similarly, the Supreme Court of Appeals has rejected “expansive interpretation[s]” of boards’ authority, and instead “traditionally construed [their] power and authority . . . in a very narrow fashion.” *Bailey v. Truby*, 174 W. Va. 8, 14, 321 S.E.2d 302, 309 (1984). *Bailey* addressed the specific question of the authority of a county board of education, but its rationale likely extends with similar force here: Like school boards, the Board is “created by statute, with functions of a public nature expressly given, and no other.” *Id.* at 14-15, 321 S.E.2d at 309 (quoting Syl. pt. 4, *Shinn v. Bd. of Educ.*, 39 W. Va. 497, 20 S.E. 604 (1894)).

Second, similar statutes do not support a broad interpretation of “any place.” Legislative intent can sometimes be gleaned by “read[ing] and appl[ying] together” statutes “which relate to the same subject matter.” Syl. pt. 3, *Farley*, 186 W. Va. 693, 414 S.E.2d 454. Yet other definitions of “pharmacy” in the Code contain the same ambiguity. The definition of “pharmacy” under the Audit Integrity Act is identical to the definition in Section 30-5-4(53), for example, except that it does not include out-of-state locations. *See* W. Va. Code § 33-51-3. For its part, the definition of “pharmacy” in the Uniform Controlled Substances Act includes “any drugstore, apothecary or place within this state where drugs are dispensed and sold.” *Id.* § 60A-10-3. At most, then, this definition may support interpreting the definition in Section 30-5-4(53) to include an entire building where that building is a drugstore or similar place, but not where the rest of the store sells unrelated products, such as a grocery store or big-box retailer.

By contrast, the legislative rules the Board has promulgated pursuant to its authority under Section 30-5-7 strongly suggest that “pharmacy” does not include the entire building in situations like these. In the absence of “explicatory legislative history for an ambiguous statute,” courts “must consider the [statute’s] overarching design.” *Dunlap v. Friedman’s, Inc.*, 213 W. Va. 394, 399, 582 S.E.2d 841, 846 (2003). Other regulations the Board has issued—and significantly, that the Legislature has approved—provide some evidence of the Pharmacy Practice Act’s “overarching design.” *See, e.g.*, Syl. pt. 5, *Smith v. W. Va. Human Rights Comm’n*, 216 W. Va. 2, 602 S.E.2d 445 (2004) (holding that legislative rules have “the force and effect of law”); *Appalachian Power Co. v. State Tax Dep’t of W. Va.*, 195 W. Va. 573, 584, 466 S.E.2d 424, 435 (1995) (explaining that legislative rules are treated “as statutory enactments”). Consider for example West Virginia Code of State Regulations § 15-1-14, which establishes the permitting process required for pharmacies to operate. Where a pharmacy “moves to a new address *or a different location within the current building*,” it “shall apply for a new registration and submit the appropriate fees.” W. Va. Code St. R. § 15-1-14.5.3 (emphasis added). Similarly, where a pharmacy “is to be operated for a period less than [the] regular business hours *of the entire store or institution*,” *id.* § 15-1-14.7.1 (emphasis added), the “pharmacy area *shall be separated from the other departments of the store or institution* by a floor to ceiling, physical barrier or partition, with entry doors that can be securely locked,” *id.* § 15-1-14.7.1(a) (emphasis added). Interpreting “pharmacy” to include an entire store would make meaningless these requirements that plainly

distinguish between a pharmacy, on the one hand, and the larger “building,” “store[,] or institution” in which it is situated, on the other.

Third, interpreting “pharmacy” to include an entire retail establishment that contains a pharmacy may lead to absurd results—and “[w]here a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made.” Syl. pt. 7, *State ex rel. Charles Town Gen. Hosp. v. Sanders*, 210 W. Va. 118, 556 S.E.2d 85 (2001). Many big-box retailers, grocery stores, and convenience stores are primarily engaged in retail operations with little or no connection to the distribution of drugs or provision of pharmacist care. In situations where these stores contain separate pharmacy areas, an expansive view of “any place” in the definition of “pharmacy” could afford the Board a considerable degree of regulatory authority over economic activities that are well outside its bailiwick—and that may in fact be governed by different regulatory bodies, like a county health department or the Alcohol Beverage Control Administration. There is no indication in the statute that the Legislature intended the Board’s authority to sweep so far. Nor is there any reason to read this broad grant of implicit authority as “necessarily or reasonably incident” to the Board’s express powers. *McDaniel*, 214 W. Va. at 727, 591 S.E.2d at 285. The more logical interpretation is that where a pharmacy operates under the same roof as a larger store, the Legislature intended the Board’s jurisdiction to apply to only the specific “place” in that building where drugs are dispensed and pharmacist care is provided.

Finally, we recognize that there may be cases where the boundary between the pharmacy and the rest of a store is not clear. It does not necessarily follow, for instance, that just because the definition of “pharmacy” very likely does not include the entire store, it cannot apply to the area in the immediate vicinity of the pharmacy proper. We note that a reviewing court will likely uphold the Board’s reasonable determinations in this sphere. *See, e.g., W. Va. Health Care Cost Review Auth. v. Boone Mem’l Hosp.*, 196 W. Va. 326, 339, 472 S.E.2d 411, 424 (1996) (“[C]ourts should defer to an implementing agency’s interpretation of [a] statute, as long as that interpretation is reasonable.”). Nevertheless, it is beyond the scope of this Opinion to describe the limits of the Board’s authority when determining the precise place a “pharmacy” ends and the rest of the store begins.

Sincerely,



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