



STATE OF WEST VIRGINIA
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June 7, 2012

David E. Potters, Esq.
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West Virginia Board of Pharmacy
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Dear Mr. Potters:

This is in response to your letter of May 9, 2012, requesting an Attorney General's Opinion with respect to a petition for a declaratory ruling that has been filed with the Board of Pharmacy (hereinafter "the Board"). In said Petition, a copy of which you have provided to our office, Petitioners Walgreen Co. and the Kroger Co. seek a declaration from the Board pursuant to W. Va. Code § 29A-4-1, as to the interpretation, validity, and constitutionality of certain aspects of the West Virginia Pharmacy Act, W. Va. Code § 30-5-12b.

THE QUESTION

The issue presented in your request is whether the Board has the authority to entertain and issue the declaratory ruling sought by the Petitioners as to the proper interpretation, validity, and constitutionality of certain aspects of the Pharmacy Act.

ANALYSIS

Fundamental principles of constitutional and administrative law dictate the conclusion that the Board does not have the authority to issue the ruling sought by the Petitioners. As is the case with all administrative agencies and boards in West Virginia, which are within the Executive Branch, the power of the Board is limited by the agency's enabling statute and the West Virginia Administrative Procedures Act. Simply stated, the Board cannot act outside the scope of the authority delegated to it by the Legislative Branch, and cannot usurp the constitutional duties of the Judicial Branch. Accordingly, the Board lacks the legal power to issue the declaratory ruling sought by the Petition.

In the case under consideration, the Petitioners request that the Board issue a ruling holding that, *inter alia*, W. Va. Code § 30-5-12b is void for vagueness, preempted by federal law, void under the doctrine of desuetude, and/or prospective only in effect. Any of these rulings would lie outside

the Board's authority: "It is fundamental law that the Legislature may delegate to an administrative agency the power to promulgate rules to implement the statute under which the agency functions. In exercising that power, however, an administrative agency *may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority.*" Syllabus Point 3, *Rowe v. West Virginia Dept. of Corrections*, 170 W. Va. 230, 292 S.E.2d 650 (1982) (emphasis supplied).

The Board's authority has been clearly delineated by the Legislature. Nowhere in the West Virginia Pharmacy Act is the Board granted the authority to interpret its own enabling statute, except under provisions granting the Board authority to promulgate rules. See W. Va. Code §§ 30-5-2, 30-5-12b(1) & (p), 30-5-28. Accordingly, the Board is limited to the procedures generally available to administrative agencies under the West Virginia Administrative Procedures Act (hereafter WVAPA), W. Va. Code § 29A-1-1 *et seq.* Although the Board may possess the ability to interpret provisions of its governing statutes for general applicability by promulgating a legislative or interpretive rule, it lacks the authority to issue any such interpretation through the vehicle of a declaratory ruling.

Even the Board's promulgation of legislative or interpretive rules under the WVAPA is subject to limitation: "A statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syllabus Point 1, *Consumer Advocate Division of Public Service Commission v. Public Service Commission*, 182 W. Va. 152, 386 S.E.2d 650 (1989).

Thus, the Board may not make any finding undermining its own statutory authority, whether through a declaratory ruling or through the formal rule-making process under the WVAPA.

"Any limitations on an agency's [statutory] right to declare or rule with respect to the applicability of its rules, etc., is determined by the scope of its own rulemaking authority." *McIntyre v. Board of Education*, 461 A.2d 63, 67 (Md. App. 1983) (relating to Maryland's statutory equivalent to § 29A-4-1). Declaratory rulings under the WVAPA are strictly limited in their scope and function. The ability of a State agency to issue a declaratory ruling is limited to questions of "*applicability* to any person, property or state of facts[.]" and its binding effect is narrowly circumscribed:

A declaratory ruling, if issued after argument and stated to be binding, is binding between the agency and the petitioner *on the facts alleged*, . . . but it shall not be binding on any other person.

W. Va. Code § 29A-4-1 (emphasis added).

In other words, a declaratory ruling may be issued only to determine the applicability of a statute or rule to a factual situation unique to the petitioner. The Petitioners here, however, do not

request a ruling for this purpose; rather, the Board is asked to adopt broad conclusions of law as to the constitutionality of the Pharmacy Act. As a result, the Petition is more closely akin to a request for the promulgation of a legislative or interpretative rule than a request for a declaratory ruling. *See* W. Va. Code § 29A-1-2(d) (specifically providing that a declaratory rule is *not* the same as a legislative rule).

The provisions of the WVAPA applicable to these broader agency statements, including statements of policy or interpretation, highlight this latter distinction. The WVAPA defines as a rule:

. . . every regulation, standard or *statement of policy or interpretation* of general application and future effect, including the amendment or repeal thereof, affecting private rights, privileges or interests, or the procedures available to the public, adopted by an agency to implement, extend, apply, interpret or make specific the law enforced or administered by it or to govern its organization or procedure . . . every rule shall be classified as “legislative rule,” “interpretive rule” or “procedural rule,” all as defined in this section, and shall be effective only as provided in this chapter.

W. Va. Code § 29A-1-2(I) (emphasis added). In addition, the Board must comply with the procedures contained in West Virginia Code § 29A-3-9, including notice and comment and legislative and judicial review, before issuing any such rule. Without complying with those protections, any ruling issued by the Board at the behest of the Petitioners will lack legal effect. *Id.*; § 29A-3-2(b).

A declaratory ruling, by contrast, is binding only “on the facts alleged.” W. Va. Code § 29A-4-1; *see also* A. Neely, *Administrative Law in West Virginia* § 4.27, at 166 (“The outcome of the declaratory ruling, after argument, is not binding on such [non-participating] persons; therefore, there are no adverse consequence which they will suffer as a result of not participating.”). Unlike a legislative rule, a declaratory ruling is, by its nature, a limited procedure with a limited reach and a limited application, not the broad relief sought by the Petitioners.

In short, neither the Petitioner nor the Board may use the narrow vehicle of a declaratory ruling as an end-run around the legislative process or the procedures required for the promulgation of a rule under the WVAPA.

Moreover, any attempt to issue the declaratory ruling sought by the Petition would violate the constitutional doctrine of separation of powers, by usurping the role of the Legislature in enacting laws and the role of the Judiciary in interpreting them. “Article V, section 2 of the Constitution of West Virginia, which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion, it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed.” Syllabus Point 1, *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 279 S.E.2d 622 (1981). The Petitioners ask the Board to declare a

constitutionally enacted statute invalid and unenforceable. The Board does not have the authority to make such a determination, which is the province of the Judiciary alone. *See, e.g.*, 2 Am Jur 2d, Administrative Law § 77 (“[I]t is axiomatic that an administrative agency has no power to declare a statute void or otherwise unenforceable.”). Further, “it is an abuse of authority for an agency to either permit the use of the declaratory statement process by one party to a controversy as a vehicle for obstructing an opposing party’s pursuit of a judicial remedy, or as a means of obtaining, or attempting to obtain, administrative preemption over legal issues then pending in a court proceeding involving the same parties.” *Suntide Condo. Ass’n, Inc. v. Div. of Florida Land Sales, Condominiums & Mobile Homes, Dept. of Bus. Regulations*, 504 So. 2d 1343, 1345 (Fla. Dist. Ct. App. 1987). Thus, the Board “should refrain from issuing a declaratory statement until the proceedings in court conclude.” *Padilla v. Liberty Mut. Ins. Co.*, 832 So. 2d 916, 919 (Fla. Dist. Ct. App. 2002) (citations omitted).

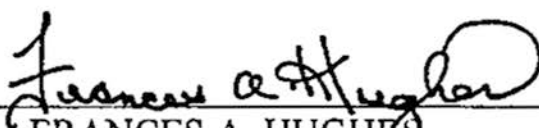
If it is a change in statutory law that the Petitioners seek, that relief, of course, may only come from the Legislature and not from the Board. The West Virginia Supreme Court of Appeals has repeatedly declared that separation of powers prevents each branch of government from invading the province of the others. Syllabus Point 1, *Consumer Advocate Division of Public Service Commission*; Syllabus Point 3, *Rowe*; Syllabus Point 1, *State ex rel. Barker v. Manchin*. It is not permissible for any administrative agency to declare a law enacted by the Legislature, especially a portion of its own enabling statute, to be unconstitutional or invalid. *Id.* Therefore, the Board’s issuance of the declaratory ruling sought by the Petitioners would violate the separation of powers in our State government, “. . . part of the fundamental law of our State[.]” Syllabus Point 1, *State ex rel. Barker v. Manchin*.

CONCLUSION

For these reasons, we conclude that fundamental principles of constitutional and administrative law prohibit the Board of Pharmacy from issuing the declaratory ruling sought by the Petitioners. For the Board to declare its own enabling statute unconstitutional would usurp the powers that are constitutionally vested solely in the Legislative and Judicial Branches.

Very truly yours,

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ATTORNEY GENERAL

By 
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