

STATE OF SOUTH DAKOTA

BOARD OF MEDICAL AND OSTEOPATHIC EXAMINERS

IN THE MATTER OF THE PETITION)
FOR DECLARATORY RULING)
REGARDING APPLICATION OF)
SDCL 36-4-11.1 AND 36-4A-8.2)

FINAL DECLARATORY RULING

Margaret B. Hansen, Executive Director for the South Dakota Board of Medical and Osteopathic Examiners, filed a Petition for Declaratory Ruling on September 7, 2012. This Petition requested a final declaratory ruling from the Board of Medical and Osteopathic Examiners concerning the applicability of SDCL 36-4-11.1 and 36-4A-8.2 to various temporary licenses, permits, certificates (including the 60 day locum tenens certificate) established in SDCL chs. 36-4 and 36-4A. The Executive Director requests resolution of the following questions:

1. Do SDCL 36-4-11.1 and 36-4A-8.2 apply to temporary licenses, permits, certificates, and sixty day locum tenens certifications issued under the provisions of SDCL chs. 36-4 and 36-4A?
2. If the statutes apply to temporary licenses, can the temporary license be issued provisionally by the Executive Director pending the completion of the background check and prior to Board ratification?

The Executive Director, represented by counsel Assistant Attorney General William Golden, explained to the Board the timing issues involved in applying the criminal background check requirements of SDCL 36-4-11.1 and 36-4A-8.2 to the various temporary licenses, permits and certificates issued under authority of SDCL chs. 36-4 and 36-4A. Many of these temporary licenses, permits and certificates are time-sensitive, and the Staff currently processes and issues them within a matter of days. The process

involved in obtaining a criminal background investigation, which requires the physical mailing of fingerprint cards multiple times (Staff to applicant, applicant to Staff, Staff to Division of Criminal Investigation), add several weeks to the time period involved in obtaining the temporary licenses, permits and certificates. Locum tenens certifications for emergency situations (arising, for example, from natural disasters where physicians are brought into the state to assist in providing medical care to affected persons) are particularly time-sensitive, and the delay of even days can prevent emergency medical care being provided to natural disaster victims. The several week delay associated with mailing of the fingerprint cards can also affect other temporary licenses, permits, or certificates authorized under SDCL 36-4-11.1 and 36-4A-8.2 that are time-sensitive.

The Executive Director's Petition basically raises a question of statutory construction. The rules of statutory construction require that explicit language expressed in the statute be primarily considered. Words and phrases used must be given their plain meaning and effect. Further, the intent of the statute must be determined from the statutory provisions as a whole, as well as other enactments relating to the same subject. It is presumed that the Legislature did not intend an absurd or unreasonable result. *RBO v. Congregation of Priests*, 2011 SD 87, ¶ 22; *State Auto Insurance Cos. v. BNC*, 2005 SD 89, ¶ 18; *Anderson v. City of Tea*, 2006 SD 112, ¶ 5.

The involved statutes state:

SDCL 36-4-11.1 (emphasis added):

Each applicant for licensure as a physician in this state shall submit to a state and federal criminal background investigation by means of fingerprint checks by the Division of Criminal Investigation and the Federal Bureau of Investigation. Upon application, the Board of Medical and Osteopathic Examiners shall submit completed fingerprint cards to the Division of Criminal Investigation. Upon completion of the criminal background check, the Division of Criminal Investigation shall forward to the board all information obtained as a result of the criminal background check. This information shall be obtained prior to permanent licensure of the applicant. The Board of Medical and Osteopathic Examiners may require a state and federal

criminal background check for any licensee who is the subject of a disciplinary investigation by the board. Failure to submit or cooperate with the criminal background investigation is grounds for denial of an application or may result in revocation of a license. The applicant shall pay for any fees charged for the cost of fingerprinting or the criminal background investigation.

SDCL 36-4A-8.2 (emphasis added):

Each applicant for licensure as a physician assistant in this state shall submit to a state and federal criminal background investigation by means of fingerprint checks by the Division of Criminal Investigation and the Federal Bureau of Investigation. Upon application, the board shall submit completed fingerprint cards to the Division of Criminal Investigation. Upon completion of the criminal background check, the Division of Criminal Investigation shall forward to the board all information obtained as a result of the criminal background check. This information shall be obtained prior to permanent licensure of the applicant. The board may require a state and federal criminal background check for any licensee who is the subject of a disciplinary investigation by the board. Failure to submit or cooperate with the criminal background investigation is grounds for denial of an application or may result in revocation of a license. The applicant shall pay for any fees charged for the cost of fingerprinting or the criminal background investigation.

There are other statutory provisions relating to the licensure of physicians and physician assistants. SDCL 36-4-11 states in part, "Any person desiring to engage in the practice of medicine or osteopathy, surgery, or obstetrics in any of their branches in this state shall apply to the Board of Medical and Osteopathic Examiners for a license. ..." SDCL ch. 36-4 also authorizes issuance of a number of temporary licenses, permits and certificates. For example, SDCL 36-4-20 authorizes issuance of a "temporary permit" to a physician for supervised practice in a state-owned and operated medical institution based upon an urgent need in the facility that cannot be adequately and effectively served by a regularly licensed practitioner. SDCL 36-4-20.1 authorizes issuance of a "locum tenens certificate" to a physician for the practice of medicine in South Dakota for sixty days; this is used not only for emergencies where out-of-state physicians are brought in to assist in providing medical care to those affected, but also when a physician with a rural practice takes vacation or requires other short-term leave, and a physician is needed to cover his practice. SDCL 36-4-20.6 authorizes the issuance of a

resident certificate, allowing a resident in an approved residency program to practice medicine during residency; this practice is associated with medical education requirements.

Similarly, SDCL 36-4A-4 and -8 require a physician assistant to be licensed. SDCL 36-4A-8.1 authorizes issuance of a temporary permit for practice as a physician assistant after graduation but before completing the examination or obtaining examination results. SDCL 36-4A-11 authorizes issuance of a temporary six-month license when the licensee is licensed in another statute.

In construing the meaning of SDCL 36-4-11.1 and 36-4A-8.2, the Board considered all of these statutory provisions, the definition of license appearing in SDCL ch. 1-26 including permits and other approvals, and the protection of the public health and safety, which is the underlying purpose of the licensing statutes. The Board also considered the time delay involved in obtaining the results of the criminal background investigation and the effect of that delay on the issuance of the temporary licenses.

The Board hereby determines that SDCL 36-4-11.1 and 36-4A-8.2 apply to all permits, licenses, and certificates issued under SDCL chs. 36-4 and 36-4A. The requirement in SDCL 36-4-11.1 and 36-4A-8.2 that states "This information shall be obtained prior to permanent licensure of the applicant", is specifically interpreted to mean that the Board may issue provisional temporary permits, licenses and certificates pending the results of the criminal background investigation, but that this information must be received prior to issuance of any permanent permit, license or certificate.

This interpretation furthers the plain intent of the Legislature by establishing a procedure to apply the statutes to the temporary permits, licenses and certificates in a manner which continues to allow medical care to be provided during emergency situations, short term specific community or practitioner needs, and other time-sensitive situations. It also furthers the Legislature's intent to

require criminal background investigations prior to issuance of permanent licenses, certificates, or permits.

Dated this 12th day of September, 2012.

A handwritten signature in black ink, reading "Robert L. Fenech MD". The signature is written in a cursive style with a horizontal line underneath the name.

Board of Medical and Osteopathic Examiners