WESTERN MICHIGAN LEGAL SERVICES

Kent • Ionia • Montcalm

89 Ionia, N.W. • Suite 400 • Grand Rapids, MI 49503

1 (800) 442-2777 Telephone: (616) 774-0672 FAX: (616) 774-2412

website: www.wmichls.org

MICHAEL C. CHIELENS, *EXECUTIVE DIRECTOR*

July 1, 2004

Janet Olszewski
Director
Department of Community Health
Sixth Floor, Lewis Cass Building
320 South Walnut Street
Lansing, Michigan 48913

Re: Request for Declaratory Ruling Regarding Employment Rights of Katina Sherrills

Dear Ms. Olszewski,

Pursuant to MCL 24.263, we are writing to request a declaratory ruling on the interpretation of MCL 333.20173, which concerns the employment of persons with criminal records in the nursing care industry.

Katina Sherrills has worked as a certified nurse's aid since approximately 1995, providing care to elderly patients in various facilities. She currently works for two agencies: Spectrum Health Worth Home Care, where she has been employed since 2002, and Health Partners, where she has been employed since 1998. Both agencies assign her, on an as-needed basis, to various nursing homes, group homes, brain injury units, rehabilitation units, and private care patients. She was previously employed by the Birchwood Care Center and the Riverside Nursing Home. Ms. Sherrills has an excellent work history and is beloved by her patients. (See attached resume, letter of recommendation, and performance evaluations.) Ms. Sherrills also has a ten-year-old felony conviction for welfare fraud.

For much of the time since 1999, Ms. Sherrills has been assigned by her various employers to work at the Spectrum Continuing Care Center, a nursing care facility covered by MCL 333.20173. Ms. Sherrills was originally assigned there by Health Partners and was subsequently assigned there by Spectrum Health Worth Home Care.

In recent months the Spectrum Continuing Care Center has been unable to provide Ms. Sherrills with sufficient hours of work. For example, during one recent three-week period, Ms. Sherrills received zero hours one week, eight hours another week, and twenty hours the third week. Ms. Sherrills, who is a single parent, cannot afford to provide for her four children on this very limited income. Therefore, Ms. Sherrills has repeatedly requested a transfer to one of the other Spectrum Health

facilities where there is a shortage of nurse's aids. Ms. Sherrills estimates that there are approximately 290 posted open positions within Spectrum Health, and that she is qualified for approximately 70% of these positions. However, Spectrum Health has refused to allow Ms. Sherrills to transfer to one of the open positions, because it maintains that she is disqualified for a transfer under the criminal record provisions of MCL 333.20173. Spectrum Health also refused to allow Ms. Sherrills to add hours at any other Spectrum facility. Spectrum's refusal to allow Ms. Sherrills to transfer to another facility or to add hours was based solely on Ms. Sherrills' criminal record. Ms. Sherrills is otherwise qualified for the transfer and would, pursuant to Spectrum's transfer policies, be entitled to transfer to a new position with her seniority intact.

After counsel became involved in this case, Spectrum Health Worth Home Care terminated Ms. Sherrills' assignment at the Spectrum Continuing Care Center. In a letter dated June 16, 2004, Spectrum Health informed Ms. Sherrills that she could work in the home care division, but was not eligible to be contracted out to skilled nursing facilities or homes for the aged because she has a felony conviction. (See attached letter.) Ms. Sherrills was previously making $13.93/hour for weekday work and $15.56/hour for weekend work. (See attached paystub.) She will receive only about $10.75/hour for work in the home care division. Moreover, Spectrum Health has been unable to provide Ms. Sherrills with regular, full-time hours through the home care division.

While Ms. Sherrills would prefer to transfer to a nursing-home position within the Spectrum Health network (and thereby retain her seniority), she must necessarily also consider the possibility of transferring to a non-Spectrum position. Spectrum Health has been providing Ms. Sherrills with only very limited hours. Moreover, Ms. Sherrills is also concerned that, because she has demanded a transfer, retained counsel, and aggressively fought for the shifts and transfers to which she is entitled under Spectrum's seniority provisions, Spectrum will eventually refuse to assign her even private duty cases.

Over ten years ago Ms. Sherrills was convicted of welfare fraud/failure to inform, a felony. The circumstances were as follows. Ms. Sherrills, who was a college student and welfare recipient, was able to pick up some seasonal work. Ms. Sherrills knew that she had to report this income and she accordingly turned in her paystubs after the work was completed. Ms. Sherrills did not realize that she was supposed to report new employment immediately after being hired, rather than waiting until she had been paid. Ms. Sherrills was prosecuted for welfare fraud. Ms. Sherrills also has a 1996 misdemeanor conviction for second degree retail fraud. Under MCL 333.20173, this conviction does not affect her ability to work in nursing care facilities. (See attached criminal record print-out.)

Under MCL 333.20173 a person who has committed a felony within the past 15 years (or who has committed a specified misdemeanor within the last 10 years) cannot be hired by a nursing home. However, the statute specifically provides that the law "do[es] not apply to an individual who is employed by, under independent contract to, or granted clinical privileges in a health facility or agency before the effective date of the amendatory act that added this section." The effective date of the Act was May 10, 2002. Thus the legislature drew a distinction between individuals employed after the effective date, who are ineligible to work if they have a felony or specified misdemeanor, and individuals employed prior to the effective date, who are "grandfathered in" even if they have

a felony or specified misdemeanor. This letter seeks to clarify the rights and status of those "grandfathered" workers.

Spectrum Health has conceded that Ms. Sherrills was employed by them before the effective date of the Act. Spectrum Health also does not deny that Ms. Sherrills was employed by the Continuing Care Center since 1999, having been assigned there by Health Partners. However, Spectrum Health's position is that because Spectrum Health initially assigned Ms. Sherrills to private duty cases and did not assign Ms. Sherrills to the Continuing Care Center (or any other facility covered by MCL 333.20173) until after May 10, 2002, Spectrum Health cannot allow Ms. Sherrills to work in a covered facility. While Spectrum Health has allowed Ms. Sherrills to work at the Continuing Care Center until a few weeks ago, it now claims that this was an error.

Spectrum's counsel has informed Ms. Sherrills' counsel that Spectrum has no concerns about Ms. Sherrills' work. Rather, Spectrum has denied Ms. Sherrills a transfer and has now terminated her assignment to the Continuing Care Center because Spectrum believes Ms. Sherrills may be prohibited from such an assignment under MCL 333.20173. Spectrum's counsel agreed that the statutory language is unclear about whether Ms. Sherrills is barred from employment in a nursing care facility, or whether she is grandfathered in due to her prior work history in nursing homes. However, Spectrum's counsel felt obligated to advise her client to adopt the most restrictive interpretation of the law in order to protect Spectrum. Because Spectrum's obligations under the law are unclear, it did not feel it could risk allowing Ms. Sherrills to continue working at the Continuing Care Center, despite the fact that she has worked there without incident since 1999.

Spectrum Health has been aware of Ms. Sherrills' criminal record from the time of her employment and has, until she began insisting on her right to transfer, treated her as an employee who was "grandfathered in" under the provisions MCL 333.20173(2). When Ms. Sherrills applied for employment with Spectrum Health Worth Home Care, she fully disclosed her criminal record. After initially being given private duty cases, she was assigned to the Continuing Care Center, a facility covered by MCL 333.20173. In January 2003, Ms. Sherrills also signed a "Continued Employment Agreement" acknowledging that she had to report the future arrest or conviction of any felonies or specified misdemeanors. (See attached agreement.) Since all continuing employees are required to sign such a form pursuant to MCL 333.20173(11), the fact that Spectrum Health required Ms. Sherrills to sign this form indicates that it was treating Ms. Sherrills as a "grandfathered" employee.

The question which we submit for a declaratory ruling is:

> Do subsections (1) and (2) of the statute apply to an individual who is employed by, under independent contract to, or granted clinical privileges in a health facility or agency by the effective date of the amendatory act, but who subsequently seeks to transfer his or her employment either to another employer or to another facility or agency through the same employer?

Under the accepted rules of statutory interpretation, there are five reasons why the statute should be understood to allow continued employment in the nursing care industry for persons who transfer jobs, but who were employed in covered facilities prior to the effective date of the amendatory act.

First, a plain reading of the statute suggests that a person like Ms. Sherrills should not be denied the right to work in her profession simply because the facility where she is currently employed can no longer provide her with sufficient hours or because she happened to move from one contracting agency to another. The language is clear: subsections (1) and (2) of the statute "do not apply to an individual who is employed by . . . a health facility or agency before the effective date of the amendatory act." Ms. Sherrills was employed as a nurse's aid by health facilities and agencies prior to May 10, 2002, when the Act became effective. Therefore the law should not apply to her.

Second, the legislative intent here supports the plain language of the statute. The legislature, by specifically exempting persons already employed in the health care field, was seeking to protect individuals who, like Ms. Sherrills, have already pursued a career in the health care industry. This legislative decision reflects an awareness that there are many skilled and dedicated health care workers who are currently employed in the health care industry, but who have criminal records. It makes no sense to deprive those individuals of their livelihood, especially since many of them have been providing excellent care to nursing home residents for years. It makes no sense to deprive the health care industry, which is one of the few fields with chronic staffing shortages, of qualified and experienced workers. And it makes no sense to deprive elderly nursing home patients of experienced workers. The Act already protects nursing home residents against the possibility that their caretakers will engage in criminal behavior in the future, since it requires employees to report immediately upon arrest or conviction of one of the specified offenses. This underscores the forward-looking nature of the Act.

Third, as a matter of public policy it is counterproductive to interpret the statute so that a person with a criminal record who is already employed in the health care field loses the right to work in that field simply because of a job transfer or temporary break in employment. Such an interpretation would mean that when a facility reduces staff or closes altogether, individuals who are laid off or whose hours are cut have no alternative but to leave the profession they have chosen. In other words, a person like Ms. Sherrills who has worked as a nurse's aid for almost a decade would be shut out of the profession, while a similarly situated individual who had the good fortune to work for a more stable facility, could continue to work in the field. If a nursing home closes down, why should the CNAs employed there not only have to find new jobs, but also new careers? What about a nurse's aid who leaves a job due to illness? Does she then also lose the right to work in the field forever? If a temporary break in employment means that the individual can no longer work in the field, then would a nurse who takes a year off to have a baby no longer be able to practice in any facility covered by the Act?

Neither Ms. Sherrills, nor any of the hypothetical individuals mentioned above, are any less capable of working in the health care field than they were on May 10, 2002, when the legislature thought their prior employment was sufficient reason to exempt them from the bar on employment which applies to other individuals with criminal convictions. Moreover, refusing to allow health care

practitioners to continue in the field if they switch employers would have draconian consequences. For example, a nurse who leaves a job in Grand Rapids for one in Detroit in order to marry or be closer to ailing parents, would no longer be able to work in the field. A nurse who was subjected to inhumane working conditions, say racial or sexual harassment by a supervisor, would be afraid to seek other employment, since changing jobs would mean giving up her profession entirely. Conversely, a practitioner who is highly regarded for her excellent skills could not accept an offered promotion at another facility, as the promotion would cost her the right to work in the very field in which she had excelled. Interpreting the law so that it would have such results is counter to public policy.

Significantly, an interpretation of the law which allows "grandfathered" employees to change jobs would not prevent employers from considering an individual's criminal record when making hiring or transfer decisions. An employer might still decide that an individual's criminal record is so serious, recent, or relevant that a hire or transfer is not warranted. All that the requested ruling allowing job changes would do is enable employers to make a decision on the merits about whether to hire or transfer an applicant who was "grandfathered" at another facility.

Fourth, given the way in which the nursing home industry is organized, an interpretation of the statute which would forbid transfers by "grandfathered" employees makes no sense. Many nursing care staff work for agencies that contract out their employees to various facilities and/or for agencies that are sub-units of a larger health care conglomerate. Nothing in the statute suggests that employees cannot transfer between different agencies or facilities managed by the same employer. Moreover, if a "grandfathered" agency employee can be contracted out to work at facility X because she was working at that facility prior to May 10, 2002, why should that employee not be able to receive hours at facility Y, even though she was not working there prior to May 10, 2002? After all, the statute specifically "grandfathers in" individuals who were previously employed by *either* a health facility or an agency. MCL 33.20173(2).

Ms. Sherrills' situation demonstrates the absurdity of a rule that forbids job changes for "grandfathered" employees. Like many nursing care employees, Ms. Sherrills seeks to get sufficient hours by working for multiple agencies simultaneously, in this case Spectrum Health Worth Home Care and Health Partners. While Spectrum Health did not assign Ms. Sherrills to the Continuing Care Center nursing facility until after May 10, 2002, Health Partners did. Clearly, Ms. Sherrills is "grandfathered" with respect to Health Partners. Thus, Health Partners may send Ms. Sherrills to the Continuing Care Center or any other nursing facility. It makes no sense that Ms. Sherrills can work at the Continuing Care Center, or other nursing facilities, when her assignment comes through Health Partners, but cannot work at the Continuing Care Center, or other nursing facilities, when her assignment comes through Spectrum Health.

Finally, it is a basic principle of statutory interpretation that statutes, where possible, should be construed to be constitutional. Here, a ban on employment by experienced health care workers with criminal convictions would interfere with the settled expectations of both those health care workers and health care employers. This raises concerns about an unconstitutional retroactive application

of the law, as well as concerns under the Equal Protection and Due Process Clauses of the Michigan and U.S. Constitutions.

For the reasons stated above, we respectfully request a declaratory ruling that subsections (1) and (2) of MCL 333.20173 do not apply to an individual who is employed by, under independent contract to, or granted clinical privileges in a health facility or agency before the effective date of the amendatory act, but who subsequently seeks to transfer his or her employment either to another employer or to another facility or agency through the same employer. We further request that the ruling specifically state that the Act does not bar Ms. Sherrills from seeking employment with another employer or from transferring to another unit within Spectrum Health.

It is critically important that the Department of Community Health provide guidance to both employers and employees about the question of whether individuals whom the legislature elected to "grandfather in" can transfer jobs. Hundreds or perhaps thousands of individuals who are currently employed in the nursing home field cannot risk leaving their jobs until this issue is resolved. Moreover, employers need certainty about whom they can and cannot hire. Without clarity on the job transfer issue, employers will attempt to protect themselves from liability by refusing employment to individuals who are in fact "grandfathered in" under the Act.

We look forward to hearing from you.

Sincerely,

Katina Sherrills

Miriam Aukerman
Attorney at Law

cc: Laurie Gibson, Counsel for Spectrum Health
Sarah Slocum, State Long Term Care Ombudsman