



STATE OF MICHIGAN
DEPARTMENT OF COMMUNITY HEALTH
LANSING

JENNIFER M. GRANHOLM
GOVERNOR

JANET OLSZEWSKI
DIRECTOR

Declaratory Ruling 2005/001

Western Michigan Legal Services, on behalf of Katina Sherrills (Ms. Sherrills), has requested a declaratory ruling from the Michigan Department of Community Health (MDCH) pursuant to MCL 24.263 and Administrative Rule 325.1211, on the interpretation of the Public Health Code's (the Code) prohibition of a health facility's employment of individuals with certain criminal convictions. I granted Ms. Sherrills' request on the following question:

Does Section 20173 of the Code (MCL 333.20173), 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?

Ms. Sherrills' lawyer submitted a letter in support of her position on this issue.¹

Ms. Sherrills has worked as a certified nurse's aide since approximately 1995, providing care to elderly patients in various facilities. Up until July 2004, Ms. Sherrills worked for two health agencies: Spectrum Health Worth Home Care, where she had been employed since 2002, and Health Partners, where she had been employed since 1998. Both agencies assigned her, on as-needed basis, to various nursing homes, group homes, brain injury units, rehabilitation units and private care patients. Since 1999, Ms. Sherrills' employers had assigned her to work at the Spectrum Continuing Care Center, a nursing care facility.

In approximately 1994, Ms. Sherrills was convicted of welfare fraud, a felony.

In 2002, the legislature amended Part 201 of article 17 of the Code to require background checks on new employees of nursing homes, county medical care facilities and homes for the

¹ The Women's Resource Center of Grand Rapids also provided a brief letter concerning this issue.

aged. (HB 4057, 2002 PA 303, MCL 333.20173(4) and (5)). Additionally, the legislature prohibited health facilities, after May 10, 2002, from employing individuals with certain criminal convictions. Section 20173(1) of the Code states, in pertinent part:

Except as otherwise provided in subsection (2), a health facility or agency that is a nursing home, county medical care facility, or home for the aged shall not employ, independently contract with, or grant clinical privileges to an individual who regularly provides direct services to patients or residents in a health facility or agency after the effective date of the amendatory act that added this section if the individual has been convicted of one or more of the following:

- (a) A felony or an attempt or conspiracy to commit a felony within the 15 years immediately preceding the date of application for employment or clinical privileges or the date of the execution of the independent contract.

* * *

(2) . . . This subsection and subsection (1) 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 that added this section.

MCL 333.20173(1) and (2). The effective date of this amendment was May 10, 2002.

Due to Spectrum Continuing Care Center's apparent inability to provide Ms. Sherrills with sufficient hours of work, Ms. Sherrills requested a transfer to one of the other Spectrum Health Facilities where there was a shortage of nurse's aides. 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 Section 20173.

It is my role to implement Part 201 in accordance with the legislative intent, as expressed by the plain language of the statute. If the language is ambiguous, then Part 201 must "be liberally construed for the protection of the health, safety, and welfare of the people of this state." MCL 333.1111. However, statutes should be construed to prevent absurd results,

injustice, or prejudice to the public interest. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998).

According to the House Legislative Analysis Section's summary of this legislation, the legislature passed section 20173 in an effort to increase protection for the elderly and disabled by requiring criminal history checks on "new" employees in nursing homes, county medical care facilities, and homes for the aged, thus enabling facilities to screen out potential employees with a history of abuse and/or other criminal conduct. House Legislative Analysis, HB 4057, September 6, 2002.

By exempting those individuals who were "employed by, under independent contract to, or granted clinical privileges in a health facility or agency before the effective date" from the requirements of Sections 20173(1) and (2), the legislature drew a clear 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 effectively "grandfathered in" even if they have a criminal conviction.

In interpreting and enforcing the statute, I must assume that the legislature intended the meaning it has plainly expressed. The statute must be enforced as written. *In re Certified Questions*, 416 Mich 558, 567; 331 NW2d 456 (1982). Acts must be considered in their entirety, and no statutory provision may be treated as superfluous or without meaning. *Danto v Michigan Bd of Medicine*, 168 Mich App 438, 442; 425 NW2d 171 (1988). "We must suppose every word employed in a statute has some force and meaning, and was made use of for some purpose." *Potter v Safford*, 50 Mich 46, 48; 14 NW 694 (1883).

A plain reading of the statute demonstrates that individuals in Ms. Sherrills' situation should not be denied the right to work in their profession simply because the facility where they are currently employed can no longer provide them with sufficient hours or because they happen to move from one contracting agency to another. Section 20173(2) states: "This subsection and subsection (1) 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 that added this section." MCL 333.20173(2) (emphasis added). In this case, Ms. Sherrills was employed as a nurse's aide by *a* health facility or agency before May 10, 2002, when the act became effective.

Section 20173 is not employer-specific. Rather, the legislature, by specifically exempting individuals already employed in the health care industry, sought to protect those individuals who have already pursued a career in that industry. The legislature's distinction reflects an awareness that there are many skilled and dedicated health care workers who were employed in the health care industry prior to the effective date of this act, but who have criminal records.

While the legislature certainly intended to enhance the Code's protections afforded to the elderly and disabled, it would be incongruous to deprive ex-offenders of their livelihood simply because either by choice, or circumstances, they seek employment with a health facility or agency other than the one they were employed by prior to May 10, 2002. Indeed, the purpose of a statutory "grandfather clause," such as subsection (2), is to provide an exception to a restriction that allows all those already doing something to continue doing it even if they would be stopped by the new restriction.

The statute's requirement of background checks is similarly "grandfathered" in that such checks are necessary only for new employees. The House Legislative Analysis Section's analysis of that aspect of HB 4057 is instructive.² The legislature considered requiring criminal background checks of all employees, current and new hires. Similar bills in previous legislative sessions would have required such checks. However, the cost of conducting background checks on all employees was "considered to be prohibitive considering the large number of people currently working in nursing homes, county medical care facilities and homes for the aged." House Legislative Analysis HB 4057, September 6, 2002. Thus, the legislature limited mandating background checks to new employees only, *i.e.*, employees employed after the effective date of the amendment, May 10, 2002. Since the legislature intended to apply the requirement of background checks only to those employees hired after the bill's effective date, it is axiomatic that it intended to similarly apply the restriction against hiring employees with certain criminal convictions only to those hired after the bill's effective date. In accord with fundamental principles of statutory application in relation to basic precepts of due process, the legislature chose to regulate the future, not the past.

Further, as a matter of public policy, it would be counterproductive to interpret the statute so that an individual with a criminal record who is already employed in the health care industry would lose the right to work in the field simply because of a job transfer or temporary break in employment. For example, a nurse who left a job in Grand Rapids for one in Detroit in order to marry or be closer to ailing parents, or even due to illness, would no longer be able to work in the

² The analysis is silent insofar as arguments, *pro* and *con*, concerning the prohibition on hiring employees with criminal convictions.

industry. Similarly, a nurse who was subjected to racial or sexual discrimination by his/her current employer, might be reluctant to seek other employment, since changing jobs would mean giving up his/her profession entirely. Conversely, a practitioner who is highly regarded because of his/her superior skills could not accept an offered promotion at another facility, as the promotion would cost him/her the right to work in the very field in which he/she had excelled. The public interest would be ill served by depriving the health care industry and elderly nursing home residents of otherwise well qualified and experienced care providers.

Significantly, my interpretation of this statute does not prevent employers from considering an individual's criminal record when making hiring or transfer decisions. An employer covered under Section 20173 may still decide that an individual's criminal record is such that a hire or transfer is inappropriate. The statute 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. MCL 333.20173(11). This further underscores the forward-looking nature of the amendment.

Consequently, it is my ruling that subsections (1) and (2) of Section 20173 of the Public Health Code 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.

January 21, 2005
Date

Janet Olszewski
Janet Olszewski, Director