

Opinion No. 88-39

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OPINION OF: HAL STRATTON, Attorney General

BY: Alicia Mason, Assistant Attorney General

TO: Dr. Robin Gaupp, Chairperson, Radiation Technical Advisory Council, P.O. Box 968, Santa Fe, New Mexico 87504-0968

QUESTIONS

Is the New Mexico Environmental Improvement Board (hereinafter "EIB") authorized to promulgate rules and regulations for radiation protection without the Radiation Technical Advisory Council (hereinafter "RTAC") approving the terms of such rules and regulations?

CONCLUSIONS

No, if the EIB promulgates regulations pursuant to the Radiation Protection Act.

Yes, if the EIB promulgates regulations pursuant to the Medical Radiation Health and Safety Act.

ANALYSIS

Section 74-3-2 of the Radiation Protection Act (hereinafter "RPA"), Sections 74-3-1 through 74-3-16 NMSA 1978, establishes the RTAC. The RTAC's purpose is "to advise the agency [the Environmental Improvement Agency] and the board [the EIB] on technical matters relating to radiation." Section 74-3-3. Section 74-3-5(A) provides that the EIB "shall with the advice and consent of the council [RTAC]," promulgate rules and regulations in the areas specified therein, including "the health and environmental aspects of radioactive material and radiation equipment...."¹ (Emphasis added).

In *Kerr-McGee Nuclear Corp. v. New Mexico Env'tl. Improvement Bd.*, 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981), the New Mexico Court of Appeals invalidated certain amended radiation protection regulations that the EIB had promulgated without the RTAC's advice and consent, because the RPA requires RTAC to approve the technical contents before the EIB can "'enact' as law regulations which seriously affect the people of this State and industry." *Id.* at 94, 637 P.2d at 44. "[T]he legislature mandates that EIB 'shall promulgate rules and regulations' not only with the advice of the council, but with its consent." *Id.* (emphasis added).

The Medical Radiation Health and Safety Act (hereinafter "MRHSA"), Sections 61-14E-1 to 61-14E-12 NMSA 1978, also authorizes the EIB to promulgate radiation protection

regulations. The Environmental Improvement Act, Sections 74-1-4 through 74-1-10 NMSA 1978, states as well that the EIB shall promulgate regulations and standards in the separate areas of "radiation control as provided in the Radiation Protection Act [74-3-1 to 74-3-16 NMSA 1978]" and "medical radiation, health and safety certification and standards for radiologic technologists as provided in the Medical Radiation Health and Safety Act." Section 74-1-8(A)(5) and (12). Therefore, radiologic technologists, chiropractors and other health care providers who use ionizing radiation in treatment must be certified pursuant to the MRHSA and regulations promulgated thereunder.

The MRHSA mandates that the EIB "shall, pursuant to the advice and recommendations of the advisory council [RTAC] and following the [hearing] procedures set forth in Section 74-1-9 NMSA 1978," adopt and promulgate rules, regulations and certification standards to effectuate the provisions of the MRHSA, maintain high standards of practice, and establish continuing education requirements. Section 61-14E-5 (emphasis added). The MRHSA does not require RTAC's approval before the EIB promulgates regulations pursuant to the MRHSA, only RTAC's advice and recommendations.² Id.

The words used in a statute must be given their ordinary and usual meaning unless the statutory language indicates that the legislature intended otherwise. *State ex rel. Duran v. Anaya*, 102 N.M. 609, 611, 698 P.2d 882, 884 (1985). Where the meaning of a statute is plain and unambiguous, there is neither need nor room for statutory construction. *New Mexico Beverage Co. v. Blything*, 102 N.M. 533, 534, 697 P.2d 952, 953 (1985). While the RPA requires that RTAC approve regulations promulgated thereunder, the MRHSA does not.

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GENERAL FOOTNOTES

[n1](#) The EIB's rule making authority is also subject to the hearing procedures set forth in Section 74-1-9 of the Environmental Improvement Act, Sections 74-1-4 to 74-1-10 NMSA 1978. See Section 74-3-5(A).

[n2](#) RTAC would present advice and recommendations to the EIB during the rule making hearing together with other testimony presented. See Section 74-1-9(E) (at the hearing all interested persons may submit data, views, oral or written arguments, propose changes, and examine witnesses testifying at the hearing.)