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OAG-02-19

Mr. Daniel M. Olson
Corporation Counsel
Sauk County West Square Building
505 Broadway Street
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Dear Mr. Olson:

¶ 1. You ask whether staff at a county jail who are trained to provide some basic emergency care prior to the arrival of medical professionals, but who are not certified by the Department of Health Services (DHS) as emergency medical responders, must comply with a “do-not-resuscitate order” issued to an inmate of a county jail. You ask this question at this time because provisions of the applicable administrative rule, Wis. Admin. Code ch. DHS 125, appear to conflict with the controlling statute, Wis. Stat. § 154.19. The statute was recently amended, see 2017 Wis. Act 12 (“Act 12”), but the rule has not been updated to reflect the statutory changes. I conclude that the statute overrides any conflicting provisions contained in the rule. Specifically, the statute does not require jail staff who are not emergency medical responders to follow a do-not-resuscitate order. The language in the rule that imposes that obligation on “first responders” is therefore unenforceable.¹

¹ An earlier informal opinion of the Attorney General addressing similar questions to those raised here was based on earlier versions of the applicable statute and rule. I-05-08 (Sept. 4, 2008). That opinion is superseded by this opinion and is hereby withdrawn.

¶ 2. A do-not-resuscitate order is a written order issued by an attending physician to a qualified patient² directing “emergency medical services practitioners, emergency medical responders, and emergency health care facilities personnel not to attempt cardiopulmonary resuscitation on a person for whom the order is issued if that person suffers cardiac or respiratory arrest.” Wis. Stat. § 154.17(2), *as amended by Act 12*. A person who has been issued a do-not-resuscitate order may wear a do-not-resuscitate order bracelet to convey the fact that he or she has such an order. Wis. Stat. § 154.27(1).

¶ 3. The statutory obligation to follow a do-not-resuscitate order is limited to the three occupations specifically named in the statute: “emergency medical services practitioners, as defined in s. 256.01(5), emergency medical responders, as defined in s. 256.01(4p), and emergency health care facilities personnel.” Wis. Stat. § 154.19(3)(a), *as amended by Act 12*. These three occupations are defined. An emergency medical services practitioner is “an emergency medical technician, an advanced emergency medical technician, an emergency medical technician — intermediate, or a paramedic.” Wis. Stat. § 256.01(5), *as amended by Act 12*. An emergency medical responder is “a person who is certified by [DHS] as an emergency medical responder,” and “who, as a condition of employment or as a member of an organization that provides emergency medical care before hospitalization, provides emergency medical care to a sick, disabled, or injured individual.” Wis. Stat. § 256.01(4p), *as amended by Act 12*. Emergency health care facilities personnel include “staff of a hospital emergency room or an urgent care clinic whose duties are to render emergency medical care to sick, disabled or injured persons conveyed to the facility.” Wis. Admin. Code § DHS 125.03(5).

² A “[q]ualified patient” is a person 18 or older who has any of the following conditions: a terminal condition; “a medical condition such that, were the person to suffer cardiac or pulmonary failure, resuscitation would be unsuccessful in restoring cardiac or respiratory function or the person would experience repeated cardiac or pulmonary failure within a short period before death occurs”; or “a medical condition such that, were the person to suffer cardiac or pulmonary failure, resuscitation of that person would cause significant physical pain or harm that would outweigh the possibility that resuscitation would successfully restore cardiac or respiratory function for an indefinite period of time.” Wis. Stat. § 154.17(4).

¶ 4. Under the plain language of the statutes, a do-not-resuscitate order does not bind county jail personnel unless they come within those three occupational definitions. For example, a staff member who is a trained and licensed paramedic will be required to follow the do-not-resuscitate order. *See* Wis. Stat. §§ 154.19(3)(a), 256.01(5), *as amended by Act 12*. However, a staff member who does not come within one of the three statutory categories is not required to follow a do-not-resuscitate order.

¶ 5. You ask whether DHS's administrative rules impose different obligations. To the extent their requirements are inconsistent with the new statutory language, they are without force. Those rules track statutory language that Act 12 superseded.

¶ 6. Prior to the enactment of Act 12, "first responders" were statutorily required to follow do-not-resuscitate order orders. *See* Wis. Stat. § 154.19(3)(a) (2015–16). The term "first responder" was defined by Wis. Stat. §§ 154.17(3m) and 256.01(9) (2015–16). Act 12 eliminated "first responder" from these statutory provisions. The phrase was deleted from section 154.19(3)(a), the provision listing the occupations required to follow do-not-resuscitate order orders. Sections 154.17(3m) and 256.01(9), the provisions that defined "first responder," were deleted from the statutes entirely.

¶ 7. The administrative rules tracked the pre-Act 12 statute by including a definition of "first responder," and directing first responders to follow do-not-resuscitate order orders. *See* Wis. Admin. Code §§ DHS 125.03(7), 125.05(1). Under section DHS 125.03(7), a first responder is "a person who provides emergency medical care to a sick, disabled or injured individual prior to the arrival of an ambulance as a condition of employment or as a member of a first responder service, and who may or may not be certified by [DHS] under [Wis. Admin. Code] ch. DHS 110 to perform defibrillation." The administrative rules have not been revised to conform to the statutory changes in Act 12. Thus, despite the fact that Act 12 removed the "first responder" category from the statutes, the rules maintain the category and require persons coming within the first-responder definition to follow do-not-resuscitate order orders.

¶ 8. The administrative rules exceed DHS's statutory authority because they are more restrictive than the statute. The DHS rules state that chapter DHS 125 is "promulgated under the authority of ss. 154.19(3)(a) and 154.27, Stats." Wis. Admin. Code § DHS 125.01. Section 154.19(3)(a) permits DHS to promulgate only rules governing the "procedures used" by the occupational categories covered by

the statute. It does not authorize DHS to impose the statutory requirement on additional occupational categories. But, whereas the statute requires only three occupational categories to follow do-not-resuscitate order orders, the rules purport to extend that obligation to an additional category—first responders. Significantly, Act 12 did not simply leave first responders off the list of persons obliged to follow these orders; it affirmatively removed them from that list. Before Act 12, first responders were specifically included; after Act 12, they were excluded. To the extent the rules purport to include first responders even though the statutes do not, the statute controls and the rules are unenforceable.

¶ 9. This is the case even though the inconsistent rules were valid when first promulgated. According to Wis. Stat. §§ 227.10 and 227.11, which govern administrative rulemaking, an existing rule that exceeds an agency’s authority under a later-enacted or amended statute is no longer enforceable once the statutory change goes into effect. *See* OAG–04–17 (Dec. 8, 2017).

¶ 10. Agency rulemaking authority is subject to specific limits set out in chapter 227. Most generally, “[n]o agency may promulgate a rule which conflicts with state law.” Wis. Stat. § 227.10(2). Thus, “[e]ach agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation.” Wis. Stat. § 227.11(2)(a). And, pertinent here, “[a] statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.” Wis. Stat. § 227.11(2)(a)3; *see generally* OAG–04–17 (Dec. 8, 2017).

¶ 11. I have applied a three-step analysis to determine whether the first-responder provisions of Wis. Admin. Code ch. DHS 125 impose “a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision.” Wis. Stat. § 227.11(2)(a)3. First, I conclude that the statute and rule contain a requirement governing the same subject matter, i.e., the occupations that must follow a do-not-resuscitate order. Second, I conclude that the rule is more restrictive than the statute because it imposes the requirement on a category of professionals not statutorily required to follow do-not-resuscitate order orders. Finally, including first responders among the persons required to follow do-not-resuscitate order orders is not “explicitly required or

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explicitly permitted by statute or by a rule that has been promulgated in accordance with” sections 227.10–.30. Wis. Stat. § 227.10(2m). There is no governing statute or rule explicitly requiring or permitting the addition of first responders to the class of occupations that must follow do–not–resuscitate order orders. Thus, I conclude that the chapter DHS 125 requirements regarding first responders are “more restrictive” than those found in the Wisconsin Statutes.

¶ 12. Because the chapter DHS 125 requirements are “more restrictive” than those found in section 154.19, the first-responder provisions of chapter DHS 125 may no longer be enforced or administered. *See* Wis. Stat. § 227.11(2)(a)3. While including first responders in the classes of occupations required to follow do–not–resuscitate order orders was valid when the governing statute included first responders, DHS cannot impose that requirement since Act 12 removed first responders from section 154.19. Because such a rule could not be lawfully “promulgate[d]” today, it can no longer be “enforce[d]” or “administer[ed]” pursuant to section 227.11(2)(a)3.

¶ 13. In summary, county jail staff are not required to follow do–not–resuscitate order orders unless they fall into one of the three occupational categories named in Wis. Stat. § 154.19(3)(a), *as amended by Act 12*.

Very truly yours,



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Attorney General of Wisconsin

BDS:MFW:jrs