STATE OF MICHIGAN

COURT OF APPEALS

FLUOROSCAN IMAGING SYSTEM,

Plaintiff-Appellant,

v

DEPARTMENT OF PUBLIC HEALTH,

Defendant-Appellee.

UNPUBLISHED
January 10, 1997

No. 171354

Ingham Circuit Court
LC No. 92-72638-CZ

Before: Smolenski, P.J., and Holbrook, Jr., and F.D. Brouillette,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an Ingham Circuit Court order affirming a declaratory ruling issued by defendant Department of Public Health. We affirm the circuit court's order.

The essential facts of this matter are undisputed. In October 1987, the Michigan Radiation Advisory Board (RAB) unanimously approved a resolution advising defendant Department of Public Health that extremity fluoroscopy machines were not warranted for human medical application because of the limited benefits to patients in comparison to the potential risks of radiation. Since early 1988, defendant has disseminated the RAB's resolution in letters to known manufacturers and users of extremity fluoroscopy equipment and indicated its acceptance of and concurrence with the RAB's position. The resolution notwithstanding, defendant has continued to register and license extremity fluoroscopy machines for use in this state. Plaintiff Fluoroscan Imaging Systems, Inc.,[1] a manufacturer and marketer of extremity fluoroscopy machines, requested that RAB members attend a demonstration of plaintiff's equipment and that they reconsider their position. Two RAB members attended a demonstration of plaintiff's equipment, resulting in the board unanimously reaffirming its resolution.

Plaintiff then requested a declaratory ruling from defendant regarding the applicability of certain provisions of the Public Health Code, MCL 333.2601 *et seq.;* MSA 14.15(2601) *et seq.*, to defendant's action. Defendant issued a declaratory ruling that disputed certain facts as set forth by plaintiff and addressed the applicability of some, but not all, of the statutory provisions cited in plaintiff's written request. In November 1992, plaintiff filed a complaint in Ingham Circuit Court seeking a

* Circuit judge, sitting on the Court of Appeals by assignment.

declaratory judgment that defendant should have promulgated rules governing its action and an injunction against further dissemination of the resolution, which plaintiff claimed was based on incomplete data and had caused a number of its customers to cancel orders for equipment. Following a hearing on plaintiff's request for a preliminary injunction and defendant's motion for summary disposition, the court remanded the matter to defendant for an evidentiary hearing, if deemed necessary, to resolve disputed facts, and for issuance of a declaratory ruling. On remand, the parties agreed to a set of stipulated facts rather than conduct an evidentiary hearing and defendant issued a second declaratory ruling. On plaintiff's petition for review, a hearing was held after which the court affirmed defendant's declaratory ruling. Plaintiff now appeals as of right to this Court.

Plaintiff challenges defendant's dissemination of the resolution of its statutorily created advisory board by a two-pronged argument. First, plaintiff argues that the resolution be set aside on procedural grounds because defendant failed to promulgate the policy as a rule pursuant to its statutory authority under Parts 26 and 135 of the Public Health Code. Second, plaintiff argues that if indeed this Court concludes that the resolution is a "rule" it is invalid pursuant to MCL 333.13521(2); MSA 14.15(13521)(2), which precludes defendant from issuing rules that limit radiation exposure to patients for lawful therapeutic or research purposes. Under these facts, we find no merit to plaintiff's arguments.

This Court reviews a declaratory ruling issued by an administrative agency in the same manner as an agency final decision or order in a contested case, i.e., pursuant to the judicial review provisions of the Administrative Procedures Act. MCL 24.263; MSA 3.560(163), MCL 24.306; MSA 3.560(206); *Michigan Ass'n of Intermediate Special Educ Administrators v Dep't of Social Services,* 207 Mich App 491, 494; 526 NW2d 36 (1994). Because the facts of this case are undisputed, the scope of this Court's review is limited to the questions of law addressed in defendant's declaratory ruling. Legal rulings of administrative agencies are not accorded the deference that is accorded to factual findings. An agency's legal rulings will be set aside on appeal if they are in violation of the constitution or a statute, or are affected by substantial and material error of law. *Amalgamated Transit Union, Local 154, AFL-CIO v Southeastern Michigan Transportation Authority,* 437 Mich 441, 450; 473 NW2d 249 (1991). See also MCL 24.306(1)(a), (f); MSA 3.560(206)(1)(a), (f).

Plaintiff first argues that defendant's adoption of the RAB's resolution should have been promulgated as a rule pursuant to defendant's statutory authority under Parts 26 and 135 of the Public Health Code.

Pursuant to the Public Health Code, defendant "shall continually and diligently endeavor to prevent disease, prolong life, and promote the public health" through its statutory authority of "general supervision of the interests of the health and life of the people of this state." MCL 333.2221(1), (2)(a); MSA 14.15(2221)(1), (2)(a). Under Part 135 of the PHC—entitled "Radiation Control"—defendant is designated as "the radiation control agency of this state and shall coordinate radiation control programs of state departments acting within their statutory authorities." MCL 333.13515; MSA 14.15(13515). The Radiation Advisory Board was created under Part 135 as an independent advisory board whose members are appointed by the governor with the advice and consent of the senate. MCL

333.13531; MSA 14.15(13531). The RAB's sole statutory duty is to "furnish to the department technical advice the board deems desirable or the department may reasonably request on matters relating to the radiation control program." MCL 333.13531; MSA 14.15(13531).

The rule promulgation requirements regarding radiation control are set forth in § 13521 of Part 135, which provides, in pertinent part:

> The department shall promulgate rules providing for general or specific licenses or registration, or exemption from licensing or registration, for radioactive materials and other sources of ionizing radiation. The rules shall provide for amendment, suspension, or revocation of licenses. In connection with those rules, the department may promulgate rules to establish requirements for record keeping, permissible levels of exposure, notification and reports of accidents, protective measures, technical qualifications of personnel, handling, transportation, storage, waste disposal, posting and labeling of hazardous sources and areas, surveys, and monitoring. [MCL 333.13521(1); MSA 14.15(13521)(1).]

The plain import of § 13521 is to mandate that defendant promulgate rules regarding registration and licensing of radioactive materials and other sources of ionizing radiation. However, where registration and licensing are not directly implicated, defendant is accorded discretion regarding rule promulgation. Plaintiff concedes that, notwithstanding defendant's concurrence with the RAB resolution, defendant has continued to register and license extremity fluoroscopy machines for use in this state. Thus, the RAB's technical advice which was directed to defendant pursuant to its statutory authority and which did not directly implicate the registration or licensing of extremity fluoroscopy machines was not subject to the mandatory rule promulgation requirements of Part 135.

Plaintiff argues, however, that certain provisions of Part 26 of the PHC also apply in this instance, requiring defendant to promulgate rules to ensure that the collection and dissemination of medical data and research by the RAB was accurate, valid, and reliable. Plaintiff argues that Parts 26 and 135 must be read together to effectuate fully the Legislature's intent.[2] We disagree. First, although the PHC encompasses numerous articles, parts, and sections that address numerous divergent topics, no general provision of the statute indicates that all articles, parts, and sections are to be read in conjunction with all other articles, parts, and sections. Thus, the Legislature has not indicated its intent that the dissemination of technical advice by the RAB to defendant be constrained by the rule promulgation requirements of Part 26 of the PHC. Second, given the specificity of rule promulgation requirements set forth in § 13521 regarding radiation control programs, there is no need to look to the general requirements of rule promulgation set forth in Part 26. See *Gebhardt v O'Rourke,* 444 Mich 535, 542-543; 510 NW2d 900 (1994) (where a statute contains both a general provision and a specific provision, the specific provision controls). Finally, we acknowledge that § 2601 of the code provides: "Unless otherwise provided, this part [Part 26] applies to all data made or received by the department." However, we do not agree with plaintiff that mere technical advice provided to defendant by the RAB constitutes "data," as that term is defined in § 2603(1):

"Data" means items of information made or received by the department which pertain to a condition, status, act, or omission, existing independently of the memory of an individual, whether the information is retrievable by manual or other means and whether or not coded. It includes the normal and computer art meanings of the word data. [MCL 333.2603(1); MSA 14.15(2603)(1).]

We construe the term "data" as including information that is of an empirical or fact-based nature, not mere technical advice or opinions of an advisory board.[3] Thus, we decline to impose the rule promulgation requirements of Part 26 on the RAB resolution. Accordingly, for the reasons set out above, we conclude that defendant was not required to promulgate the RAB resolution as a rule before dissemination.

In the second prong of its challenge to defendant's action, plaintiff argues that, given the substantial impact of the resolution on the use of extremity fluoroscopy machines in Michigan, the RAB resolution constitutes a "rule" under the Administrative Procedure Act, and, as such, it is invalid pursuant to MCL 333.13521(2); MSA 14.15(13521)(2), which provides:

(2) The rules [promulgated by defendant pursuant to § 13521(1)] shall not limit the intentional exposure of patients to radiation for the purpose of lawful therapy or research conducted by licensed health professionals.

We find plaintiff's argument to be based on two faulty premises.

First, the RAB resolution cannot be construed as a "rule." The APA defines a "rule" as "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission thereof." MCL 24.207; MSA 3.506(107). The label an agency gives to a directive is not determinative of whether it is a rule under the APA. *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Services*, 431 Mich 172, 188; 428 NW2d 335 (1988). Instead, this Court must review the "actual action undertaken by the directive, to see whether the policy being implemented has the effect of being a rule." *Id.*, quoting *Schinzel v Dep't of Corrections*, 124 Mich App 217, 219; 333 NW2d 519 (1983).

Here, defendant's adoption of the RAB resolution does not "implement[] or appl[y] law enforced or administered by the agency," and therefore it does not come within the definition of a rule. *American Federation of State, County & Mun Employees v Dep't of Mental Health,* 452 Mich 1; 550 NW2d 190 (1996). To reiterate, defendant has expressed its *opinion* that the disadvantages of extremity fluoroscopy outweigh its benefits, but this opinion has not prevented defendant from continuing to register and license the machines for use in this state. Moreover, an exception to the statutory definition of a "rule" includes "[a] decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." MCL 24.207(j); MSA 3.560(107)(j). Although plaintiff has a valid interest in maintaining a market for its extremity fluoroscopy

machines in this state, defendant's acceptance of the RAB's resolution flowed directly from its statutory authority under Part 135 of the PHC to furnish defendant with technical advice. Therefore, defendant's action constituted a permissive exercise of statutory authority that was excepted from the rule promulgation requirements of the APA. See *Pyke v Dep't of Social Services,* 182 Mich App 619, 630-631; 453 NW2d 274 (1990); *Hinderer v Dep't of Social Services,* 95 Mich App 716; 291 NW2d 672 (1980). This holding is entirely consistent with the language of § 13521(2) which permits the medical profession to retain a large measure of control and discretion, in the context of patient radiation therapy, to determine the nature and amount of radiation exposure that is beneficial for medical purposes.

Second, even if defendant's adoption of the resolution constituted a "rule" under the APA, § 13521(2) would not necessarily be implicated. The limit imposed on defendant by § 13521(2) concerns regulatory action (i.e., licensing or registration) that would either ban certain types of radiation exposure or would place specific limits on the amount of radiation exposure permitted. Thus, defendant's dissemination of its opinion that extremity fluoroscopy machines are generally not warranted for human medical applications does not constitute the type of regulatory action contemplated by § 13521(2). Accordingly, for the reasons outlined above, defendant's declaratory ruling is upheld.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Francis D. Brouillette

[1] Fluoroscan Imaging Systems, Inc., was formerly known as HealthMate, Inc. For purposes of this opinion, we consider the corporate entities as interchangeable.

[2] Plaintiff relies on §§ 2611, 2614, and 2621 of Part 26 of the PHC in support of its argument.

[3] Addressing this question in its declaratory ruling, defendant ruled that "information received by the RAB does not come within the description of 'data' defined in MCL 333.2603; MSA 14.15(2603) because that definition of 'data' applies exclusively to 'items of information made or received by the *department,*'" not by the RAB. Moreover, defendant ruled that the RAB resolution was not data "even if it was 'received by the department,' because it constitutes the advice and position provided by the RAB pursuant to its authority and duty under MCL 333.13531; MSA 14.15(13531)."