

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
07-CVS-3574

2007 SEP 21 P 12: 55

NORTH CAROLINA DEPARTMENT
OF CORRECTION, THEODIS BECK,
Secretary of the North Carolina
Department of Correction, in his official
capacity, and GERALD BRANKER,
Warden of Central Prison, in his official
capacity,

Plaintiffs,

vs.

NORTH CAROLINA MEDICAL BOARD,
Defendant.

WAKE COUNTY, CSC

**ORDER GRANTING PLAINTIFF'S
REQUEST FOR DECLARATORY
RELIEF AND DENYING
DEFENDANT'S MOTION TO
DISMISS**

THIS CAUSE coming on to be heard and being heard before the undersigned judge presiding over the 29 August 2007 Session of Wake County Superior Court upon Plaintiffs' Amended Complaint seeking declaratory and injunctive relief and upon Defendant's Motion to Dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiffs seek a declaration that Defendant lacks the authority to enforce its Position Statement on capital punishment prohibiting a physician's professional participation in judicial executions. Defendant contends that Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted, that Plaintiffs have failed to identify a justiciable case or controversy, and that Plaintiffs lack standing to bring this action.

WHEREFORE, having reviewed and considered the pleadings, memoranda, and arguments of counsel for the parties, the undersigned makes the following:

DECLARATIONS OF LAW

1. The people of the State of North Carolina, by and through their elected representatives in the North Carolina General Assembly, have enacted laws that provide for the imposition of the death penalty by lethal injection. N.C. Gen. Stat. § 15-187.

2. The North Carolina General Assembly has delegated to the Warden of Central Prison, subject to the approval of the Governor and the Council of State, the responsibility for providing "the necessary appliances for the infliction of the punishment of death and qualified personnel" to perform those tasks required to carry out the sentence of death. N.C. Gen. Stat. §§ 15-188,-190 (2005).

3. The North Carolina General Assembly requires that the "surgeon or physician" of Central Prison shall be present during every execution. N.C. Gen. Stat. § 15-190 (2005). This requirement was first enacted in 1909.

4. The North Carolina General Assembly has also mandated that the "surgeon or physician" of Central Prison, along with the Warden "certify the fact of the execution of the condemned person, convict or felon to the clerk of the superior court in which such sentence was pronounced." N.C. Gen. Stat. § 15-192 (2005).

5. Defendant North Carolina Medical Board was established by the North Carolina General Assembly "to regulate the practice of medicine and surgery for the benefit and protection of the people of North Carolina." N.C. Gen. Stat. § 90-2 (2005). These provisions originated in the Medical Practices Act of 1858.

6. The North Carolina General Assembly has also empowered that Board to "deny, annul, suspend or revoke a license, or other authority to practice medicine in this State, issued by the Board to any person" for certain enumerated reasons, including "unprofessional conduct,

including, but not limited to, departure from ..the ethics of the medical profession....” N.C. Gen. Stat. § 90-14(a)(6) (2005).

7. Logic and common sense would suggest that the requirements in N.C. Gen. Stat. § § 15-190 and -192, – imposing a specific duty and task upon the surgeon or physician of Central Prison to be “present” for executions and to “certify the fact of the execution” – are indicative of a statutory intent by the General Assembly to require the attendance and professional participation of a physician by reason of that individual’s occupation, training and expertise in medicine. The legislature intended that a physician be present to perform medical tasks attendant to an execution for which the physician is uniquely qualified, including: (1) ensuring, to the extent possible, that the condemned inmate is not subjected to unnecessary and excessive pain which could constitute cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution and Section 27 of the North Carolina Constitution; and (2) examining the inmate at the conclusion of the procedure for the purpose of determining and pronouncing death.

8. The plain language of the Medical Board’s Position Statement prohibits any professional conduct by the surgeon or physician to assess and prevent unnecessary or excessive pain experienced by the inmate, including such activities as: (1) monitoring the essential body functions of the inmate; (2) observing the monitoring equipment assessing those body functions; (3) providing professional expertise and medical advice to correctional staff participating in the execution; (4) notifying the Warden or other correctional staff members of any perceived problems with the establishment or maintenance of the intravenous sites or with the preparation and administration of the required chemicals or with the adequacy of the dosage units of those chemicals to be administered to a particular inmate to insure that the inmate would be rendered

unconscious and unlikely to experience pain during the execution process. The physician is prohibited from treating any medical problem or issue that might arise during an execution and from actually examining the inmate for any medical purpose, including determining and pronouncing that death has occurred.

9. By the Medical Board's Position Statement, the Board has declared that the medical activities outlined in paragraph 8 above, whether or not those activities are required by the laws and Constitutions of the United States and North Carolina, violate the ethics of the medical profession. The Board's Position Statement prohibits such activities and gives notice that any physician participating in that conduct will be subject to discipline even where the activities are performed in accordance with State law.

10. There exists in this matter a ripe and justiciable case and controversy, as the Board's promulgation of this Position Statement improperly and unlawfully prevents the North Carolina Department of Correction and, in particular, the Warden of Central Prison from carrying out judicial executions by lethal injection in accordance with Article 19 of Chapter 15 of the General Statutes and the Constitutions of the United States and this State. The Medical Board's Position Statement has prevented enforcement of the death penalty as required by current State law. In promulgating the Position Statement, the Board has improperly exceeded the authority bestowed upon it to regulate the practice of medicine. It has declared physician conduct unethical and subject to discipline even though such conduct is specifically authorized and required by law. The Plaintiffs have standing to litigate this issue.

11. Judicial executions carried out in accordance with Article 19 of Chapter 15 of the North Carolina General Statutes do not constitute a medical event or medical procedure subject to review by the North Carolina Medical Board. When acting in compliance with N.C. Gen.

Stat. § 15-190 and -192, physicians participating in executions, even if engaged in medical evaluations, examinations, assessments and procedures, are not subject to review or regulation by the Medical Board.

CONCLUSIONS OF LAW

The Medical Practices Act of 1858, which forms the origin of N.C. Gen. Stat. § 90-2, was not intended to give to the North Carolina Medical Board the authority to prohibit doctors from performing specific statutory tasks enacted by the legislature in other statutes including tasks which are currently embodied in N.C. Gen Stat. § § 15-190 and -192. In creating those tasks in 1909, the legislature clearly intended that a physician attend and provide professional medical assessment, assistance and oversight in every judicial execution compelled by law upon inmates convicted and sentenced to death by jury verdict in the superior courts of this State.

Although the current effort by the Medical Board to prohibit physician participation in executions may well be viewed as humane and noble, such a decision rests entirely with representatives elected by the citizens of this State, the North Carolina General Assembly. As of this date, the legislature has taken no such action.

WHEREFORE, it is ordered adjudged and decreed that:

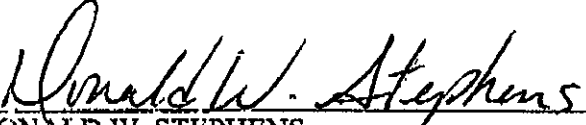
1. The Plaintiffs' request for preliminary and permanent injunctive relief prohibiting Defendant from enforcing the Position Statement and taking disciplinary action against physicians who have participated in or otherwise have been involved in judicial executions by lethal injection or who will in the future participate or otherwise be involved in judicial executions by lethal injection be ALLOWED; and

2. A judicial execution is not a medical event or medical procedure and is outside the scope of Chapters 90 and 131B of the North Carolina General Statutes; and

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3. That Defendant's Motion to Dismiss this action be DENIED.

This, the 21 day of September, 2007.


DONALD W. STEPHENS
SENIOR RESIDENT SUPERIOR COURT JUDGE