



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 23, 1998

The Honorable René O. Oliveira
Chair, Committee on Economic Development
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 98-025

Re: Construction of section 3.05(c) of the
Medical Practice Act (RQ-1042)

Dear Representative Oliveira:

Your questions regard provisions of the Medical Practice Act (the "act"), V.T.C.S. article 4495b, relating to the reciprocal licensing in Texas of a physician who is already licensed to practice medicine in another state. The procedure about which you ask is known as "licensure by reciprocity" or "licensure by endorsement." You ask whether the Texas State Board of Medical Examiners (the "board") may apply section 3.05(c) of the act, which permits an applicant for licensure to take a licensing exam no more than three times, to an applicant for licensure by reciprocity. If it may, you ask whether the board may apply section 3.05(c) to a reciprocal applicant who, having taken the exam more than three times, nevertheless became licensed in another state before the examination limit in section 3.05(c) became law.

As you know, a person may not practice medicine in Texas unless licensed to do so under the act.¹ Section 3.05 of the act requires all license applicants "not otherwise licensed under the provisions of law" to successfully pass a uniform examination as a condition of being granted a license.² An applicant who fails the examination may re-take it not more than two additional times for a total of three attempts.³ You state that the examination requirement of section 3.05(c) does not clearly apply to a physician who is already licensed in another state and who seeks licensure by reciprocity, since section 3.05(c) applies only to applicants "not otherwise licensed under the provisions of law." In 1939, Attorney General Opinion O-866 concluded that the phrase "not otherwise licensed under the provisions of law" means "not otherwise licensed under the provisions

¹V.T.C.S. art. 4495b, § 3.07; *see also* Tex. Const. art. XVI, § 31 (authorizing the legislature to pass laws "prescribing the qualifications of practitioners of medicine in this State").

²V.T.C.S. art. 4495b, § 3.05(c).

³*Id.*; *see also* Texas State Board of Medical Examiners, 22 T.A.C. §§ 163.2, 163.3 (requiring applicant by examination to pass exam within three attempts).

of *this law*,” meaning the law providing for licensure by examination.⁴ We likewise think that it is reasonable to construe “not otherwise licensed under the provisions of law” to mean “not otherwise licensed under the provisions of *this law*,” meaning the Medical Practice Act. In other words, the examination requirements of section 3.05 may be applied to a person licensed to practice medicine in another state but not licensed to practice in Texas.

In any event, even if the examination requirements of section 3.05 do not apply to applicants for licensure by reciprocity, we conclude that the board may apply an examination limit to reciprocal applicants pursuant to section 3.03 of the act. Section 3.03 deals with reciprocal licensing in Texas of physicians already licensed to practice in another state or in Canada. It provides:

The board, at its sole discretion and upon payment by an applicant of a fee prescribed by the board under this Act, may grant a license to practice medicine to any physician who is a graduate of an acceptable medical college as determined by the board and who is a licensee of another state or Canadian province having requirements for physician registration and practice substantially equivalent to those established by the laws of this state.⁵

The application must be accompanied by, among other things, “evidence of a passing grade on an examination required by the board.”⁶ Section 3.03 lists a number of other licensing requirements and grounds for denial of a license, but the list is not exhaustive: “In addition to the requirements prescribed by this section, the board may require applicants to comply with other requirements that the board considers appropriate.”⁷ The board has adopted rules providing that an applicant for licensure by endorsement must “submit evidence of passing, within three attempts, an examination, acceptable by the board for licensure by endorsement.”⁸ Thus board rules adopted under the authority of section 3.03 impose the same testing limit upon out-of-state reciprocal applicants as is imposed upon Texas applicants by examination under section 3.05.

⁴See Attorney General Opinion O-866 (1939) at 2-3. The opinion construed V.T.C.S. article 4501, a predecessor to current article 4495b, section 3.05.

⁵V.T.C.S. art. 4495b, § 3.03(a).

⁶*Id.* § 3.03(b)(4). Board rules list the various examinations that are accepted by the board for licensure by endorsement. Texas State Board of Medical Examiners, 22 T.A.C. § 163.1.

⁷V.T.C.S. art. 4495b, § 3.03(g).

⁸Texas State Board of Medical Examiners, 22 T.A.C. § 163.4 (applying to licensure by endorsement for graduates of United States and Canadian medical schools); *id.* § 163.5 (applying to licensure by endorsement for graduates of unapproved foreign medical schools).

A court of appeals considered questions very similar to yours in *Callejo-Tolosa, M.D. v. Texas State Board of Medical Examiners*.⁹ In that case, a doctor who graduated from medical school in the Philippines and who was licensed in Vermont applied to the board for licensure by reciprocity. The doctor had obtained her Vermont license after taking the examination eight times. The board denied the application on the grounds that the doctor had not complied with a board rule that required an applicant, after the third examination failure, to complete one year of training before repeating the exam. The doctor protested the application of the rule to her, but the court upheld the denial, citing the board's powers under section 3.03 to regulate the granting of the privilege to practice medicine in this state:

The Board is authorized to institute rules that it deems necessary to effectively regulate the practice of medicine. Act § 2.09(a). In addition to applying the published standards, the rules call for the Board to subjectively evaluate [the] applicants' qualifications. For example, section 3.03(a) of the Act states:

The board, *at its sole discretion* . . . may grant a license to practice medicine to any physician who is a graduate of an acceptable medical college as determined by the board and who is a licensee of another state or Canadian province having requirements for physician registration and practice substantially equivalent to those established by the laws of this state.

Act § 3.03(a) (emphasis added). Furthermore, section 3.03(g) authorizes the Board to require applicants to comply with "other" requirements which it deems appropriate, in addition to the ones specifically prescribed in section 3.03. These grants of authority by their very nature require the Board to exercise considerable discretion and subjectively analyze the background and training of applicants. Furthermore, the Board's policy of applying rule 163.9(c) to reciprocity applicants is reasonable. Applying the rule to all Texas licensure applicants ensures that reciprocity applicants possess the same level of competence as other physicians licensed to practice medicine in Texas.¹⁰

We believe the same reasoning supports the board's rules requiring a reciprocal applicant to have passed an accepted examination within three attempts in order to be licensed in Texas.

Your second question is whether section 3.05(c) may be applied to an applicant for licensure by reciprocity who took the examination and became licensed in another state before the testing

⁹875 S.W.2d 762 (Tex. App.--Austin 1994, no writ).

¹⁰*Id.* at 764-65 (emphasis added).

limitation in section 3.05(c) became effective.¹¹ We answer this question with respect to both section 3.05(c) and the board rules adopted pursuant to section 3.03.¹² Your letter suggests that application of the testing limit to a person who had already become licensed after taking the examination more than three times is an unfair and unlawful retroactive application of the law.

Applied to the type of situation and applicant you describe, the testing limit would be retroactive in the sense that it would require the board to take into consideration conduct that took place prior to the requirement's effective date.¹³ Mere retroactivity is not sufficient to invalidate the statute or rules on constitutional grounds, however, since a retroactive law is prohibited by the constitution only if it takes away or impairs a vested right.¹⁴ A license to practice medicine in Texas is a privilege, not a vested right.¹⁵ Accordingly, we conclude that a statute and rules establishing an examination limit may lawfully be applied to an applicant for licensure by reciprocity who took the examination and became licensed in another state before the statute and rules became effective.

¹¹The three-attempt limit for applicants for licensure by examination was added to section 3.05(c) by the Seventy-third Legislature and became effective on September 1, 1993. See Act of May 30, 1993, 73d Leg., R.S., ch. 862, § 14, 1993 Tex. Gen. Laws 3374, 3385. Board rules imposing the same requirement became effective on February 18, 1994. See Texas State Board of Medical Examiners, 19 Tex. Reg. 784 (1994) (codified at 22 T.A.C. §§ 163.2, 163.3).

¹²The three-attempt rules for applicants for licensure by reciprocity first became effective on February 18, 1994. See Texas State Board of Medical Examiners, 19 Tex. Reg. 784 (1994) (codified at 22 T.A.C. §§ 163.4, 163.5).

¹³See *Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 648 (Tex. 1971).

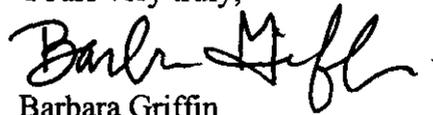
¹⁴*State v. Project Principle, Inc.*, 724 S.W.2d 387, 390 (Tex. 1987); *Merchants Fast Motor Lines, Inc. v. Railroad Comm'n*, 573 S.W.2d 502, 504 (Tex. 1978); see Tex. Const. art. I, § 16 ("No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made.").

¹⁵See V.T.C.S. art. 4495b, § 1.02 ("[T]he practice of medicine is a privilege and not a natural right of individuals . . ."); see also *Sherman v. State Bd. of Dental Examiners*, 116 S.W.2d 843, 846 (Tex. Civ. App.--San Antonio 1938, writ ref'd) (holding that license to practice profession such as dentistry or medicine is not vested right).

S U M M A R Y

The Texas State Board of Medical Examiners is not prohibited from requiring applicants for licensure by reciprocity to have passed an accepted licensing examination within three attempts. A statute and board rules establishing an examination limit may lawfully be applied to an applicant for licensure by reciprocity who took the examination and became licensed in another state before the statute and rules became effective.

Yours very truly,

A handwritten signature in black ink, appearing to read "Barbara Griffin", written in a cursive style.

Barbara Griffin
Assistant Attorney General
Opinion Committee